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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 87

WALTER K. WARREN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, AS OWNER OF THE STEAMSHIP "ANNA HOWARD SHAW", ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 24, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

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March	2	Filed Libel	1
March	17	Filed Letter from the Dept. of Justice—Form	
March	27	Filed Affidavit of Service	
April	9	Filed Answer of American South African Line Inc.	
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April	18	Filed Exceptions to Respondents' answer	
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April	25	Filed Answer of U. S. A.	
May	26	Filed Memo #15932. Exceptions Overruled—Rifkind, *J.*	
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Aug.	3	Filed Interrogs. propounded to Libelant	
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Oct.	29	Filed Exceptions to interrogs.	

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June	14	Pre-Trial Hearings—Marked Trial Cal.—Knox, *D.J.*	3
Nov.	29	Filed Interrogs. propounded to Respondents	

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Jan.	7	Pre-Trial Hearing—Marked—T. C. Knox, *J.*

Docket Entries

4 Oct. 6 Pre-Trial before Knox, *J.* Marked—T. C.—Must be tried when reached.

Oct. 27 Filed Answers to Interrogs.

Oct. 29 Trial Begun before Medina, *J.*

Oct. 30 Trial Continued & Concluded Decision Reserved

Dec. 8 Filed opinion #17223 Medina *J.*—(See Opinion)

Dec. 24 Filed Stenographer's minutes

1948

5 Mar. 5 Filed Opinion #17353 Re maintenance etc. Motion Denied. Medina *J.*

" " Filed Notice of Motion for rehearing Memo End Motion Denied etc. Medina *J.*

Apr. 30 Filed Findings of Fact and Conclusions of Law. Medina, *J.*

May 3 Filed final decree ($644.16 and $36. costs) against American South African Line and dismissing libel as against U. S. A. Medina, *J.*

May 3 Filed notice and allowance of appeal (Hulbert, *J.*) by American South African Line.

6 MAY 6 Filed Appellants' Assignments of Err

MAY 18 Filed Cross Assignments of Err

Libel and Complaint of Walter K. Warren

To the Honorable Judges of the United States District Court for the Southern District of New York 7

IN ADMIRALTY

The libel and complaint of Walter K. Warren against the United States of America, as owner of the Steamship "ANNA HOWARD SHAW", and American South African Line, Inc., as operator of the Steamship "ANNA HOWARD SHAW", in a cause of action for wages, overtime and maintenance, civil and maritime, respectfully shows upon information and belief, as follows: 8

Action Under Special Rule for Seamen to Sue Without Security or Prepayment of Fees for the Enforcement of the Laws of the United States, Common and Statutory, for the Protection and the Health and Safety of Seamen at Sea.

First: That the respondent, the United States of America, was and still is a corporation sovereign, which has by law consented to be sued herein. 9

Second: That notice of claim, pursuant to Public Law 17, was duly served by the Libellant upon the American South African Line, Inc., General Agent of the vessel, and upon the United States Attorney, for the War Shipping Administration, on the 22nd day of December, 1944, and before the commencement of this action.

10 Third: That more than sixty (60) days have elapsed since such claim, on which this action is founded, was presented to the American South African Line, Inc., General Agent of the vessel, and the War Shipping Administration, for adjustment, and that they have neglected and refused to make an adjustment or payment therefore for sixty (60) days after such presentment.

Fourth: That at all the times hereinafter mentioned the respondent, the United States of America, owned, managed and controlled a certain merchant vessel known as the S.S. "ANNA HOWARD SHAW".

11

Fifth: That the American South African Line, Inc. is a foreign corporation with an office and place of business in the Borough of Manhattan, City and State of New York.

Sixth: That at all the times hereinafter mentioned, the respondent, American South African Line, Inc., operated, managed and controlled a certain vessel known as the S.S. "ANNA HOWARD SHAW".

Seventh: That the S.S. "ANNA HOWARD SHAW" is now, or during the pendency of this action will be in the Port of New York and within the territory and jurisdiction of the United States of America. 12

Eighth: That at all the times hereinafter mentioned, libellant was employed by the respondents aboard the aforesaid steamship in the capacity of Messman, at the rate of base wages of $87.50 per month, plus overtime and bonus.

Ninth: That on or about the 30th day of October, 1944, while the S.S. "ANNA HOWARD SHAW" was lying at anchor, north of Naples, libellant was given shore leave and proceeded to a balcony of a dance hall to obtain a view of the panorama. That while standing out on the balcony he was caused to fall a distance of approximately fifty (50) feet when the railing on the balcony collapsed, whereby he sustained a fracture of the distal end of the right tibia and fibula. 13

Tenth: That he was then removed to the 118th Evacuation Hospital at Naples where he was a patient until November 17th, 1944 when he was eventually returned to New York on December 8th, 1944 and was caused to enter the U. S. Marine Hospital at Stapleton. 14

Eleventh: That by reason of the injuries so received, while in the service of the said vessel as above stated, the libellant has been incapacitated and will continue to be so incapacitated for a long period of time and by reason thereof has been put to great expense and claims to be entitled to the wages he would have earned had he been permitted to conclude the voyage aboard the S.S. "ANNA HOWARD SHAW", his transportation from Miami, Florida to New York, his repatriation bonus, his overtime and his reasonable support since his said injury until he shall be cured, in the amount of Fifteen thousand and no/100 ($15,000.00) Dollars. 15

Twelfth: That all and singular, the foregoing allegations are true, and within the Admiralty Jurisdiction of this Honorable Court.

Wherefore, libellant prays that process in due form of law, according to the course of this Honorable Court in

Admiralty cases, may issue against the said respondents and
16 that this Honorable Court may be pleased to decree the payment of libellant's claim in the sum of Fifteen thousand and no/100 ($15,000.00) Dollars, together with the costs and disbursements of this action.

Saul Sperling
Proctor for Libellant
Office & P. O. Address
61 Whitehall Street
Borough of Manhattan
City of New York—4

17

(Duly verified February 20, 1945)

18

Answer of the Respondent, United States of America, to the Libel of Walter K. Warren 19

To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of the respondent, United States of America, to the libel of Walter K. Warren, in an alleged cause of action, civil and maritime, alleges on information and belief, as follows:

First: It admits that at all the times mentioned in the libel, the respondent, United States of America, was and still is a sovereign which has by law consented to be sued in accordance with the provisions contained in the law giving such consent and not otherwise. It denies all the other matters contained in Article numbered First of the libel. 20

Second: It admits that a paper, purporting to be a notice of claim pursuant to Public Law 17, was served by the libelant upon the American South African Line, Inc., and upon the United States Attorney for the United States of America, on the 22nd day of December, 1944, and before the commencement of this action. It denies all the other matters contained in Article numbered Second of the libel. 21

Third: It admits that more than sixty days have elapsed since the presentation to the American South African Line, Inc., and this respondent, of the paper described in Article numbered Second hereof, and that they have refused to

Answer of the Respondent, United States of America, to the Libel of Walter K. Warren

22 make an adjustment or payment of any amount demanded therein. It denies all the other matters contained in Article numbered Third of the libel.

Fourth: It admits the matters contained in Article numbered Fourth of the libel.

Fifth: It admits that the American South African Line, Inc. is a domestic corporation with an office and place of business in the Borough of Manhattan, City and State of New York. It denies all the other matters contained in
23 Article numbered Fifth of the libel.

Sixth: It denies all the matters contained in Article numbered Sixth of the libel.

Seventh: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the SS ANNA HOWARD SHAW, during the pendency of this action, will be in the port of New York, and within the territory and jurisdiction of the United States of America. It denies all the other matters contained in Article numbered Seventh of the libel.

24

Eighth: It admits that on the 30th day of October, 1944, the libelant ~~was~~ employed by the United States of America aboard the SS ANNA HOWARD SHAW, in the capacity of messman, at the rate of base wages of $87.50 per month, plus overtime and bonus. It denies all the other matters contained in Article numbered Eighth of the libel.

Answer of the Respondent, United States of America, to the Libel of Walter K. Warren

Ninth: It admits that on or about the 30th day of October, 1944, the SS ANNA HOWARD SHAW was lying at anchor, north of Naples. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the other matters contained in Article numbered Ninth of the libel. 25

Tenth: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the matters contained in Article numbered Tenth of the libel.

Eleventh: It denies all the matters contained in Article numbered Eleventh of the libel. 26

Twelfth: It denies all the matters contained in Article numbered Twelfth of the libel.

As a First Complete Defense to the Libel

Thirteenth: That, if the libelant received any injuries as alleged in the libel, said injuries were caused in whole or in part by libelant's own gross negligence and/or by his own deliberate act of indiscretion. 27

As a Second Complete Defense to the Libel

Fourteenth: That libelant failed to comply with the provisions of Public Law 17—78th Cong. and H. R. 133, providing that a claim be filed before the institution of action

28 and that no action be instituted until the claim has been administratively disallowed.

As a Third Complete Defense to the Libel

Fifteenth: That the cause of action set forth is not within the jurisdiction of this Honorable Court in that at the time of the filing of the libel herein, the SS ANNA HOWARD SHAW was not within the United States, and the respondent, United States of America, asserts its immunity from suit on account of the matters alleged in the libel. 29

As a Fourth Complete Defense to the Libel

Sixteenth: That at the time of the filing of the libel herein, the SS ANNA HOWARD SHAW was not within the jurisdiction of the Southern District of New York.

Seventeenth: That it has no knowledge or information thereof, sufficient to form a belief, as to whether or not the libelant was a resident of the Southern District of New York at the time of the filing of the libel herein and it leaves the libelant to its proof thereof. 30 If libelant, at the time of the filing of this libel, was not a resident of the Southern District of New York, respondent objects to being sued in the Southern District of New York.

Wherefore, respondent demands that the libel be dismissed with costs the respondent as against the libelant and that the Court grant to the respondent such other, further and different relief as the justice of the cause may require. 31

JOHN F. X. MCGOHEY
United States Attorney

KIRLIN CAMPBELL HICKOX & KEATING
of counsel
Proctors for Respondent,
United States of America
Office & P. O. Address
120 Broadway 32
Borough of Manhattan
New York 5, N. Y.

(Duly verified April 25, 1945)

33

Answer of the Respondent, American South African Line, Inc., to the Libel of Walter K. Warren

34 To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of the respondent, American South African Line, Inc., to the libel of Walter K. Warren, in an alleged cause of action, civil and maritime, alleges on information and belief, as follows:

First: It admits that at all the times mentioned in the
35 libel, the respondent, United States of America, was and
still is a sovereign which has by law consented to be sued
in accordance with the provisions contained in the law
giving such consent and not otherwise. It denies all the
other matters contained in Article numbered First of the
libel.

Second: It admits that a paper, purporting to be a notice
of claim pursuant to Public Law 17, was served by the
libelant upon the American South African Line, Inc. on the
22nd day of December, 1944, and before the commencement
of this action. It denies that it has any knowledge or infor-
36 mation thereof, sufficient to form a belief, as to all the mat-
ters contained in Article numbered Second of the libel al-
leged with respect to the United States of America and the
War Shipping Administration. It denies all the other mat-
ters contained in Article numbered Second of the libel.

Third: It admits that more than sixty days have elapsed since the presentation, to this respondent, of the paper described in Article Second hereof, and that it has refused

to make an adjustment or payment of any amount de- 37
manded therein. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the matters contained in Article numbered Third of the libel made with respect to the United States of America and the War Shipping Administration. It denies all the other matters contained in Article numbered Third of the libel.

Fourth: It admits the matters contained in Article numbered Fourth of the libel.

Fifth: It admits that it is a domestic corporation with 38
an office and place of business in the Borough of Manhattan, City and State of New York. It denies all the other matters contained in Article numbered Fifth of the libel.

Sixth: It denies all the matters contained in Article numbered Sixth of the libel.

Seventh: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to whether the SS ANNA HOWARD SHAW, during the pendency of this action, will be in the port of New York and within the territory and jurisdiction of the United States of America. It 39
denies all the other matters contained in Article numbered Seventh of the libel.

Eighth: It admits that on the 30th day of October 1944, the libelant was employed by the United States of America, aboard the SS ANNA HOWARD SHAW in the capacity of messman at the rate of base wages of $87.50 per month, plus

40 overtime and bonus. It denies that at the time of the accident alleged in the libel, libelant was in the service of the SS ANNA HOWARD SHAW, the United States of America or this respondent. It denies all the other matters contained in Article numbered Eighth of the libel.

Ninth: It admits that on or about the 30th day of October, 1944 the SS ANNA HOWARD SHAW was lying at anchor, north of Naples. It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the other matters contained in Article numbered
41 Ninth of the libel.

Tenth: It denies that it has any knowledge or information thereof, sufficient to form a belief, as to all the matters contained in Article numbered Tenth of the libel.

Eleventh: It denies all the matters contained in Article numbered Eleventh of the libel.

Twelfth: It denies all the matters contained in Article numbered Twelfth of the libel.

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As a First Complete Defense to the Libel

Thirteenth: That, if the libelant sustained any injuries as alleged in the libel, said injuries were caused in whole or in part by libelant's own gross negligence and/or by his own deliberate act of indiscretion.

Answer of the Respondent, American South African Line, Inc., to the Libel of Walter K. Warren

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As a Second Complete Defense to the Libel

Fourteenth: That libelant failed to comply with the provisions of Public Law 17—78th Cong. and H. R. 133, providing that a claim be filed before the institution of action and that no action be instituted until the claim has been administratively disallowed.

Kirlin Campbell Hickox & Keating
Proctors for Respondent,
American South African Line, Inc. 44
Office & P. O. Address:
120 Broadway
New York, N. Y.

(Duly verified April 9, 1945)

45

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

46 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

First: State where was the SS ANNA HOWARD SHAW anchored at the time you claim to have been injured, by giving (a) the port, (b) the ship's location in the port, and (c) the pier, giving its name, number and exact location. 47

Second: State (a) who gave you shore leave, (b) when, and (c) when were you required to return to the vessel.

Third: Give the date, hour and minute when you last left the SS ANNA HOWARD SHAW prior to the time you claim you were injured.

Fourth: (a) Were you accompanied by anyone when you left the vessel at the time mentioned in the foregoing interrogatory? If so, (b) give the name or identify the individual or individuals. 48

Fifth: Did you go ashore purely for pleasure?

Sixth: If your answer to the foregoing interrogatory is in the negative, (a) state for what purpose you went ashore. If you claim that you went ashore on ship's business, state (b) what business of the ship were you ashore on, (c) name and/or otherwise identify the person who ordered you to go ashore on the said business, (d) when and where was this order given, and (e) give the names, addresses and the nature of the businesses of all persons, firms and corporations with whom the said business was transacted or was ordered to be transacted. 49

Seventh: What was your immediate destination at the time you left the vessel?

Eighth: (a) Did you go directly to the dance hall after you left the vessel? If you did, (b) trace the route you took on your way to the dance hall. 50

Ninth: (a) State as nearly as possible the distance from the place where the vessel was anchored to the dance hall where you claim you sustained your injuries. If the vessel was not anchored at a pier or dock, (b) state as nearly as possible the distance from the dance hall to the pier or dock which you traversed when you came ashore.

Tenth: (a) Do you claim that your alleged injuries were sustained in a place which you had to traverse in going from or returning to your vessel? 51

Eleventh: Were your alleged injuries sustained in a place beyond the place which you had to traverse in going from or returning to the vessel?

Twelfth: Do you claim that at the time of your alleged accident you were (a) going from or (b) returning to the vessel?

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

52 Thirteenth: If you claim that at the time of your alleged accident you were either going from or returning to the vessel, state what acts, whether mental or physical, constitute the basis for this assertion.

Fourteenth: Were you sober at the time you claim to have sustained your injuries?

Fifteenth: (a) Did you drink any alcoholic beverages during the time after you left the vessel and prior to your alleged accident? If so, (b) state what alcoholic beverages
53 you drank, (c) the quantity of each which you consumed, and (d) the place or places where you consumed these beverages.

Sixteenth: (a) State how long you had been in the dance hall before your alleged accident? (b) What did you do while there?

Seventeenth: (a) Did you go out on the balcony alone, or were you accompanied by anyone? If you were accompanied by someone, (b) name and/or otherwise identify the said individual or individuals.

54 Eighteenth: State what you were doing at the time you claim to have been injured.

Nineteenth: (a) Did you notice whether the balcony or any part of it was unsafe or defective? If so, (b) state in what respect and particular. If not, (c) state whether you made any examination or inspection to determine whether it was safe.

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

Twentieth: (a) Did anyone request you to go out on the balcony? If so, (b) identify that individual or individuals. 55

Twenty-first: State specifically what you did while you were on the balcony.

Twenty-second: Were you pushed or shoved by anyone at the time you claim you fell?

Twenty-third: If there were other persons on the balcony at the time you claim it collapsed, identify those individuals and state what they were doing. 56

Twenty-fourth: Identify with particularity sufficient for identification the dance hall where you claim to have sustained your accident, by giving its name, the name of the city, and the name of the street.

Twenty-fifth: Give a statement of each and every injury which you claim you sustained in the aforementioned accident, giving the name, location, extent and duration of each injury, and which, if any, you claim to be permanent.

Twenty-sixth: State how long on account of the injuries, for which you assert this respondent responsible, you were (a) confined to the hospital; (b) confined to your bed; (c) confined to your home; (d) unable to work. 57

Twenty-seventh: State the amount of money you claim you have expended for medical attention and medicines on account of the injuries for which you claim this respondent is responsible, and to what extent you have become indebted for these items, if at all.

Interrogatories Propounded to Libelant to be Answered by Him in Writing and Under Oath

58 Twenty-eighth: State the name and/or location of each and every hospital at which you claim to have received treatment, giving the dates during which this treatment was obtained, and indicate which of these treatments were in-patient and which were outpatient.

Twenty-ninth: State the amount of money you claim you have lost which you otherwise would have earned because of the injuries for which you claim this respondent is responsible.

59 Thirtieth: (a) State the date of commencement and the date of termination of the period or periods for which you claim you are entitled to maintenance and cure. (b) State the amount of money to which you claim you are entitled for maintenance and cure.

Thirty-first: State your permanent residence, giving the street, house number, town, village or city and state (country).

Thirty-second: State the country of which you were a citizen at the time of the commencement of this action and
60 state whether by nativity or naturalization, and if the latter, state where and when you were naturalized.

Dated, New York, July 25, 1945.

Kirlin Campbell Hickox & Keating
Proctors for Respondent,
American South African Line, Inc.
Office & P. O. Address
120 Broadway
Borough of Manhattan
New York 5, N. Y.

Libelant Answers the Interrogatories Propounded by Respondents

61

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

Libellant answers the interrogatories propounded by respondents as follows:

62

First: (a) & (b) S.S. Anna Howard Shaw was anchored at Magnolia, Italy, approximately seven miles north of Naples.

Second: (a) Captain Norman White. (b) At 12 Noon on October 30, 1944. (c) Midnight, same day.

Third: October 30, 1944, at about 13 o'clock.

Fourth: (a) Approximately ten members of the crew were in the same lifeboat. (b) Among whom were the ship's carpenter and messman. 63

Fifth:
&
Sixth: Libellant was given shore leave for relaxation by the captain and accordingly went sightseeing.

Seventh: Shore.

Libelant Answers the Interrogatories Propounded by Respondents

64 Eighth: (a) No.

Ninth: About a mile from where libellant went ashore.

Tenth: Yes.

Eleventh: No.

Twelfth: (b) Returning to the vessel.

Thirteenth: Had to leave the balcony in order to return to the vessel.

65 Fourteenth: Yes.

Fifteenth: (a) No.

Sixteenth: (a) One and one-half hours. (b) Danced and dined.

Seventeenth: (a) Yes.

Eighteenth: Watching the seas splashing over the breakwater.

66 Nineteenth: (a) No. (c) No.

Twentieth: (a) No.

Twenty-first: Enjoying one of the most beautiful scenes in the entire world.

Twenty-second: No.

Libelant Answers the Interrogatories Propounded by Respondents

Twenty-third: He believes there were other persons but did not take particular notice what they were doing. 67

Twenty-fourth: The dance hall was located on top of a small hill on a waterfront street that ran almost straight south along the waterfront in Magnolia, Italy, about a mile from where libellant went ashore.

Twenty-fifth: A fracture of the distal end of the right tibia and fibula resulting in an osteomyelitis which required the performing of an open reduction. Believes that condition of enlarged stiff ankle will be permanent. 68

Twenty-sixth: Was confined to hospital from October 30, 1944 to December 21, 1944, and from February 27, 1945 to May 29, 1945. (d) Was unable to work from October 30, 1944 to July 1, 1945, when he first was permitted to take a light job.

Twenty-seventh: Approximately $100.00.

Twenty-eighth: Was confined to the 118 Station Hospital at Naples, Italy from October 30, 1944 to November 17, 1944, when he was transferred by airplane to the 56th Station Hospital at Casablanca where he was confined to November 30, 1944, when he was transferred to Stapleton, Staten Island, where he was confined until December 21, 1944, and was admitted to the U. S. Marine Hospital at Detroit, Michigan on February 27, 1945, where he remained until May 29, 1945. 69

70 Twenty-ninth: Eight months wages, approximately Two Thousand Dollars; Five Hundred Dollars for miscellaneous and travelling expenses.

Thirtieth: Claims maintenance from November 30, 1944 to December 8, 1944; from December 21, 1944 to February 27, 1945, and from May 29th to July 1, 1945, at the rate of Four Dollars per day, reserving right to claim for future maintenance in the event leg disables him from doing any work.

71 Thirty-first: #528 South Grand Avenue, Lansing, Michigan.

Thirty-second: Native born American.

Saul Sperling
Proctor for Libellant
Office and P. O. Address
61 Whitehall Street
Borough of Manhattan
New York 4, New York

72 (Duly verified)

Interrogatories Propounded to Respondents, to be Answered by Them in Writing and Under Oath

UNITED STATES DISTRICT COURT 73

SOUTHERN DISTRICT OF NEW YORK

A. 135-171

[SAME TITLE]

First: State where the SS "Anna Howard Shaw" was on March 5, 1945.

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Second: Give the names of each port at which the SS "Anna Howard Shaw" was docked, the date of arrival and the date of departure therefrom since March 5, 1945.

Third: State on what date the voyage of the SS "Anna Howard Shaw", which commenced on or about May 28, 1944, came to an end.

Fourth: State what amount was paid by way of bonus to the members of the crew of the SS "Anna Howard Shaw" for the voyage which began on or about May 28, 1944.

75

Fifth: State what entry was made in the official deck log of the SS "Anna Howard Shaw" concerning the injuries of libellant on or about October 30, 1944.

Sixth: State whether or not any report was made by the Master or any other officer of the SS "Anna Howard Shaw" to the respondents or either of them, concerning libellant's injuries and hospitalization, if so, set forth a complete copy thereof.

Interrogatories Propounded to Respondents, to be Answered by Them in Writing and Under Oath

76 Seventh: State whether respondents or either of them have received or have in their possession any report concerning the hospitalization of and treatment rendered to libellant at the 118th Evacuation Hospital, at Naples, if so, set forth a true and complete copy thereof.

Eighth: State fully what acts or omission on the part of the libellant, respondent claim constituted libellant's own gross negligence.

Ninth: Describe fully each and every act which respondents claim was libellant's own deliberate act of indiscretion. 77

Tenth: State the respects in which the respondents claim libellant failed to comply with the provisionsof Public Law 17—78th Congress, H. R. 133, and the regulations thereunder.

Dated: November 19th, 1946.

Saul Sperling
Proctor for Libellant
Office and P. O. Address:
61 Whitehall Street
New York City.

78

Respondents Answering the Interrogatories Propounded by Libelant

UNITED STATES DISTRICT COURT 79

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

Respondents answering the interrogatories propounded by libellant allege upon information and belief as follows:

80

1. At sea, bound for Capetown, Africa.

2. SS ANNA HOWARD SHAW docked at the following American ports between March 5th, 1946 to November 19th, 1946.

New York, June 4, 1945
Philadelphia, January 7th, 1946
New York, February 3rd, 1946
Boston, February 4th
New Orleans, April 28th, 1946
New Orleans, April 3rd, 1946

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3. The crew was paid off at New York on or about December 23rd, 1944.

4. Following are the bonuses paid one, James Griggs, also a messman for the same voyage.

100% bonus—2 months, 2 days—	$206.67
66 2/3% " —4 months, 10 days—	346.67
Area bonus —65 days at $5.00—	325.00

Respondents Answering the Interrogatories Propounded by Libelant

82 5. Following is the entry contained in the official log regarding libellant's alleged accident.

"October 30, 1944, Naples, Italy.

Walter K. Warren, messman, on this date injured himself in fall, sent to 118th Station Hospital, Naples, Italy for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter and James M. Barr messman stated Warren was sober. Injury apparently accidental.

83 /s P. Orne N. White
Ch. Mate, Master."

On November 16th, 1944 at Naples, Italy, further statement is made with regard to libelant's injuries.

"Naples, Italy, November 16, 1944.

84 On October 30, 1944 Walter K. Warren, messman Z482851 was signed off the articles by American Consul, Naples, Italy, Walter Warren being at the time confined in No. 118 Army Base Hospital with injuries sustained as per previous entry. All of Walter Warren's papers and personal effects were delivered to him and acknowledged.

P. Orne N. White
Ch. Mate, Master."

6. The only information presently in respondents' possession regarding libelant's injuries and hospitalization is as follows:

"Fracture simple complete tibia right, distal end and fibula right end 1/3." 85

7. The respondents' present information as to libelant's hospital treatment at the 118th Evacuation hospital at Naples is above set forth in answer to interrogatory 6th.

8 and 9. Respondents are unable at this time to state fully the acts and omissions of libelant constituting gross negligence and deliberate acts of indiscretion. The libelant's alleged accident took place at a distance from the vessel and at a place where he was not under the surveillance of 86 respondents. Respondents did not shadow libelant while he was ashore and consequently are not able to state any of his acts which led up to his alleged accident and indeed have no direct information as to the manner in which libelant received any injuries. Respondents reserve the right to introduce on the trial through libelant himself the quality and character of his activities while he was away from the vessel as support, in part, for the defenses of gross negligence and deliberate acts of indiscretion.

10. Libelant failed to comply with the provisions of Public Law 17, 78th Congress, H. R. 133 and the regulations 87 thereunder in that the claim failed to disclose all of the facts and circumstances leading up to and surrounding the happenings of the event out of which it is alleged this claim arose.

88 Dated, New York, October 24, 1947.

John F. X. McGohey,
United States Attorney
Proctor for Respondent,
United States of America

By Kirlin Campbell Hickox & Keating
Of counsel to said respondent, and
Proctors for Respondent,
American South African Line, Inc.
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City of New York 5.

To:

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Proctor for Respondent
61 Whitehall Street
New York, New York

90

Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 91

A. 135-171

[SAME TITLE]

Before:

HON. HAROLD R. MEDINA,
District Judge.

New York, October 29, 1947; 92
10.30 o'clock a. m.

APPEARANCES:

SAUL SPERLING, ESQ., *Proctor for Libelant*;
X. N. Sardaro, Esq., of Counsel.

JOHN F. X. MCGOHEY, ESQ., *United States Attorney*,

and

KIRLIN, CAMPBELL, HICKOX & KEATING, ESQRS., *Proctors for Respondents*; 93
Walter X. Connor, Esq., of Counsel.

(Discussion.)

Walter K. Warren, the libelant, called as a witness in
94 his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Sardaro:

Q. Mr. Warren, will you please tell us when and where you were born. A. August the 2nd, 1910, Portland, Indiana.

Q. Have you been going to sea for any time? A. Prior to the war?

Q. Well, when did you start going to sea? A. In 1944, about May 1944, approximately, the first trip at sea.

95 Q. In October of 1944 what ship were you on? A. The Anna Howard Shaw.

Q. When did you sign articles on that ship? A. Around the 28th of May, 1944, or the 1st of June, somewhere close to that.

Q. You joined the Anna Howard Shaw about June 1, 1944? A. That is correct.

Q. In what capacity did you join it? A. As a messman in the stewards' department.

Q. And what rate of wages were you getting for that job? A. $87.50 per month, I believe.

Q. Was this only the second ship that you had served on?
96 A. Yes, that is true. I was on a couple of other ships for a short duration—a day or two.

Q. Did you make any trips to Europe on other ships? A. No.

Q. In other words, this was your first trip to Europe? A. That was my first trip overseas or across the sea.

Q. On October 30, 1944, where was the Anna Howard Shaw? A. She was in port, a small distance north of

(BAGNOLI)

Naples, Italy. I guess the name of the port was Magnolia
or something of that sort—probably six or seven miles 97
north of Naples. There was electric service road to Naples.

Q. Do you recall what date you arrived there? A. We arrived there the day before, which would have been the 29th of October.

Q. Did you go ashore on the 29th? A. No.

Q. Did you go ashore on the 30th of October? A. Yes.

Q. And before going ashore did you get any pass? A. Yes, the captain issued passes for the crew.

Q. Tell us the circumstances under which you got this
pass. A. Well, as I recall the steward came in and said
that the captain would issue passes at noon for the fellows 98
to go ashore, but half of them would have to remain and the
other half of them would go at once and they would draw
cuts to see which ones went first.

Q. And you drew one of the first, is that right? A. That is correct.

Q. And about what time of the day did you go ashore? A. Well, possibly the passes were issued at 12 o'clock but the lifeboats had to be gotten ready and a few little minor details taken care of. It must have been one or maybe even 1.30 by the time we got to shore.

Q. How did you get from the ship to shore? A. We 99
used a motor lifeboat off from the ship.

Q. And who lowered that boat? A. The deck crew, as I recall it. A deck cadet was operating the engine on the ship. It was a small motor.

Q. And how far offshore was the ship? A. Oh, judging distance by the water, it is always a little bit out of my line but it was at least a half a mile and maybe a mile.

Q. And who else was in the boat with you, if you recall?
100 A. Well, there was quite a boatload. There was three of the boys operating the lifeboat, and the water was quite rough and they had to have canvas up over them, and they probably put up about eight or nine members of the crew in the ship—in the lifeboat, and as I recall it we all got wet. We had to keep straight into the waves, the spray—

Q. About nine fellows going on shore leave at the same time? A. Well, probably nine or ten. I wouldn't say exact on that count.

Q. And after you got ashore did you all go together or did you separate? A. No, there was three of us by the
101 same coincidence started off to the right together, and it happened to be the ship's carpenter and another messman and I, and we just walking from here to there, sightseeing, not caring anything about where we were going or paying any attention.

Q. You mean you walked along the road? A. Well, it was—if it was streets they were going in all directions. As I recall, we followed the shoreline to the south.

Q. And did you go into any place in the course of your travels? A. Yes. We was in two and we saw many places, little merchants selling clothing, and curious and one thing
102 and another, just sightseeing more than anything else.

Q. Well, you were injured when you were ashore that day, were you not? A. That is correct.

Q. What place did you go into that you were injured at? A. Pardon?

Q. Where were you injured? A. In—well, you might say it was a dance hall but I would compare it to our U. S. O. clubs, is what I would actually compare it to. It was just a place, a makeshift place, a pretty fair building but a makeshift place that entertained for soldiers and one thing or another. 103

Q. What attracted you to it? A. Well, we heard music and saw people going in and out, a little activity going on.

Q. And you walked in? A. That is correct.

Q. When you got in there did they have tables and chairs? A. Well, as I recall they were—the front room was empty and the room to the right where they danced was a little orchestra in the corner and most of it was—the space was used for dancing but there was two or three tables along the back side of it which would have been the south side along the wall, and I doubt if they— maybe just light lunches and a little beer—not beer but wine. They were serving there and I do not even know whether it was intended for this or it was a place where it was just a kind of an entertainment place with just a little sideline if you wished. 104

Q. Did you sit at a table? A. I did, for a few minutes, but I was dancing most of the time.

Q. With your fellow crew members? A. Yes. There was a couple of the others there, Mr. Barr and the carpenter.

Q. And who else was sitting at the table? A. Two or three Italian people. 105

Q. And how long did you stay at this dance hall, the U.S.O.—the place of entertainment, before you were hurt?

Mr. Connor: Did you withdraw that statement about the "U. S. O.", Mr. Sardaro?

Mr. Sardaro: All right, I will withdraw that.

Q. How long were you there before you were hurt? A. Why, perhaps an hour to an hour and a half.

Q. And during that time what did you do? A. Danced
106 most of the time. I sat down a little bit between dances.

Q. Did you have any refreshments of any kind? A. As I recall, we drank one glass of wine apiece.

Q. About how large a glass? A. Oh, probably two to three ounces, maybe a four-ounce glass—not over a four-ounce glass.

Q. And that is all you had to drink? A. That is all that I had to drink in the dance hall.

Q. Well, did you have anything to drink before you got
there? A. Yes. We stopped at a little place, oh, probably
an hour before we got there, about half-way up the beach.
107 The beach was quite irregular and we walked probably
twice or three times the distance following the beachline
that it would be actually as a straight line, and we stopped
about half-way in a little place for curiosity, I guess, more
than anything else, and the boys said, "Let us see what kind
of wine they have or what their wine looks like."

They had never been ashore in Italy either, and they said, "Well, we will buy a little bottle of wine." That is the way they sell it, you know.

Q. Was the bottle of wine bought? A. As I recall it, the
reason it is so fresh in my mind, I remember the Italian
108 gentleman picking up the bottle, looking in it and shaking
it and blowing dust out of it, wiping the cobwebs off, and
then he poured a little water on it and rinsed it out and
then took it over to a barrel and opened the spigot and
filled it with wine. It was quite amusing.

Q. How big was the bottle? A. Well, perhaps comparable to the size of one of our standard beer bottles, maybe 12 ounces. Isn't that what they are?

Q. Well, about; and the three of you drank that wine? A. The three of us drank that wine. I recall they—cutting two bottles for glasses and the edges were sharp and they were quite dirty—that is why I remember it. 109

Q. Did you divide it evenly? A. We divided it evenly. I do not know whether we drank the whole bottle. I know we kind of turned up our noses slightly at it.

Q. About how much did you drink? A. Oh, possibly not over four ounces at the very most.

Q. And did you have anything else to drink after you left the ship? A. Not that I recall. In fact I know I did not, unless it was water, and I don't even recall taking a drink of water anywhere. 110

Q. So that up to the time of your accident you had consumed roughly between 7 and 8 ounces of wine? A. That would probably be a large estimate.

Q. Now what time was it that you were injured? A. Oh, I imagine 4—between 4 and 4:30. That would be 1300 to 1350 by the ship's time.

Q. 1300 would be one o'clock, would it not? A. Oh yes—I am wrong on that.

> The Court: Don't worry about the exact calculations. It was between 4 and 4:30 in the afternoon? 111
>
> The Witness: That is correct.

Q. Please tell us how you happened to be injured. A. Well, I am quite a person to enjoy nature and scenery myself, and I heard this breakwater hitting up on the rock, and spraying, and I walked around in the other room with French doors, say comparable to these panels here (indicating), if they would open to the ceiling, and they were

open and the sun was shining in from out over the sea
112 and the building was built up quite high; they were a story below, and then there was a bunch of stone piled up, probably out about 30 or 40 feet from the foundation for the sea water to hit, to protect the foundation of the building, perhaps—that is my calculation of what the stone was piled there for—and as the water would spray over the side and hit the wall it would run down and the edge of the wall was quite smooth at the bottom, and presumably—perhaps high seas were hitting and flying over the breakwater and the water running back down.

Q. Well, what happened? You walked out of this win-
113 dow? A. It was not really a balcony—I would hardly describe it as that. It was opened up and here (indicating) it was clear to the floor, like big windows, and there were posts on each side of it.

Q. How wide was it from the wall of the building, extending out from the wall? A. Well, I don't recall that exactly. I think it was probably 3 feet from where the windows of the doors opened out to the edge.

Q. And was there a rail around? A. There was no rail, protected railing. It was just a straight platform but there was an iron rod running up the side of the post, which
114 would be comparable maybe to our lightning arrester or something of that type, and I walked out there and stood and watched a little bit with my hand on the post, and it was a masonry post, and I looked over a little bit and somehow or other I took a hold of this rod which was going up along the side, probably a half-inch metal rod, and as I took a hold of it and kind of looked out a little bit to see it let loose unexpectedly, which was quite a surprise, you know, and I did not have time to recover myself, so I

held on to it and I went straight down until I came to the lower floor, and there was a railing and a porch, a metal railing stuck out, and I hit on that and turned over once and then slid straight down the lower wall, which was smooth, and made of rock or masonry, and it would not have hurt me if I hadn't slid down that with quite a force and my foot run into this pile of rock, my right foot. 115

Q. Just before the accident had you been feeling all right? A. Why, I was feeling all right. So far as I know I have never been sick.

Q. Were you feeling all right at the time? A. I was.

Q. Did the wine affect you in any way? A. No. 116

> Mr. Connor: I object to that, if your Honor pleases. We are getting into something that looks like leading. He was talking about his health but I see now it is another matter that he is talking about.
>
> The Court: I will allow it. I will overrule your objection.

Q. Were you affected in any way by this wine you had been drinking in the afternoon? A. I was not. I would never have known I drank it if I hadn't recalled it afterward. 117

Q. You fell down this place. About how far did you fall, by the way? A. Well, it was probably 15 feet, 12 to—probably 10 to 12 feet to the first railing and then probably 15 feet, oh, probably, or 18, but of course when I went down over this first railing I struck it with my right leg. It turned me over and broke the fall.

Q. After this injury what happened to you? A. Well,
118 the boys—I was kind of a little bit dazed at first and I had
this piece of rod in my hand and I remember holding it up
and looking at it, and, gee, I wondered how I got all the
way down there without wrapping it around my neck or
something, and I didn't get up right away, and then Mr.
Barr got there and he said, "Are you hurt?"

I said, "Yes, my leg is numb—my right leg is broken", and I said, "I can get up anyway", and he said, "No, don't. The boys are coming with a stretcher."

There happened to be an Army jeep out there with a
couple of Army boys in it, probably MPs or something of
119 that type on patrol, so I would have gotten up and tried to
walk.

Q. Well, were you taken to a hospital? A. Yes, I was.

Q. The 118th Station Hospital in Naples, the hospital in Naples? A. The evacuation hospital in Naples.

Q. And how long did you stay there? A. I was there from October 30th to November 17th, I believe.

Q. And from the 118th Station Hospital where were you taken? A. Well, we were loaded in a plane, a C-47 Army Transport Command plane at an airport in Naples and flown to Casablanca, North Africa.

120

The Court: That is on November 17th?

The Witness: That was on November 17th.

A. (Continuing) We possibly reached there on midnight or after it. Well, I guess it was before midnight on the 17th that we reached Casablanca.

Q. And how long did you stay at Casablanca? A. Well, the weather got bad and we couldn't get the planes out.

There was a storm between there and the Azores, and they held us there until I believe it was the 28th of the month before they loaded us on a— 121

Q. You did not get there until the 30th—I beg your pardon, you stayed there until about the 28th? A. It was —anyway, the time elapsed between flying us direct from there. We arrived in Miami, Florida, about ten o'clock at night on December 1st, so the course was probably about 32 hours flying time, or something like that.

Q. In other words, from Casablanca you waited there until weather conditions cleared? A. That is right.

Q. And then you came by plane to Miami? A. That is right. 122

Q. Did you have to pay for your food or lodging between October 30th and November 30th or December 1st? A. October 30th?

> The Court: From the time you got hurt up until the time you arrived—where was it, Miami Beach or Miami?
>
> The Witness: Miami Airport.
>
> The Court: Miami Airport?
>
> The Witness: Yes.

123

Q. Did you have to pay any medical expenses, for any medical expenses or lodging or food? A. No.

Q. Where did you go to in Miami? A. They took us to the Jackson Memorial Hospital, I and another seaman.

Q. And how long did you stay there? A. We was there four or five days, I believe—I don't know the exact date, but I believe we arrived in Staten Island, New York.

124 The Court: Let us get this little period clear. For a few days in December, where was he?

Mr. Sardaro: Jackson Memorial Hospital, in Miami.

The Court: And no expenses there for medicine or food or anything else?

The Witness: That is correct.

Q. You left Miami about the 5th or 6th of December? A. Well, somewheres near that.

Q. And you came to New York? A. Came to New York by train.

125 Q. Do you recall the date you arrived in New York? A. I don't know for sure whether it was the 8th or 11th of December. It has been quite a while ago and I have forgotten the exact date of it.

The Court: Was that in New York or Staten Island?

The Witness: Staten Island, New York, yes.

—Q. You came by train? A. That is right.

Q. You arrived at the Pennsylvania Station? A. That is right.

126 Q. How did you go from Pennsylvania Station to Staten Island? A. A Red Cross nurse picked us up in a Red Cross car, because I remember she was a neighbor of Tom Dewey, and she was telling us about her place, and she said, "You are from Lansing, aren't you?" I said, "Yes." She said, "Mr. Dewey is from Owosso," and she was asking a few questions.

Q. Did you incur any expense for the trip from Miami to Staten Island? A. The train fare was taken out of me. It was $56 or $58—I don't know exactly.

Q. Did you spend $56.84 for your railroad fare on the way up? A. Yes. 127

Q. You did not have to pay for any food or other expense on the way up? A. I do not recall whether it was given me meal tickets or we paid for our own meals on the train. I am not sure. I believe we paid for part of our own meals on the train anyway.

Q. If you did spend any money, about what is the amount that you spent? A. Well, it probably would not have been over three or four dollars at the very most—maybe five.

Q. You went to the Stapleton Hospital in Staten Island, that is, the Marine Hospital? A. That is right. 128

Q. How long were you there? A. I was there until December 21.

> The Court: The date of arrival at Staten Island is December 8th or 11th?
>
> Mr. Sardaro: December 8th, your Honor, is the correct date.
>
> Mr. Connor: December 8th it must be, your Honor.
>
> The Court: All right, December 8th to December 21st at the Stapleton Marine Hospital.

Q. And on December 21 did you make a request to be released so that you could go home for Christmas? A. I did. They had taken the cast off my leg and they wouldn't release me, only on one condition that I would report back to the Detroit Marine Hospital for further observation. 129

Q. And you traveled from Staten Island to Pennsylvania Station by yourself? A. That is right. I took a taxicab.

Q. And from there you took a train to Detroit? A. To Detroit.

Q. And you arrived in Detroit about when? A. Well, 130 I don't know the exact date. It was a day or two before Christmas.

Q. Well, the doctor gave you permission to leave the hospital? A. That is right.

Q. And from Detroit you went to your home in Lansing? A. That is correct.

Q. You had Christmas with your family? A. Yes.

Q. When did you report to the Detroit Marine Hospital? A. Well, when they released me they gave me a six weeks convalescing period.

131 The Court: What is the date that you reported at the Detroit Hospital?

The Witness: I would not know that exactly. It was probably the last of January.

(Discussion.)

The Court: It is a fact, Mr. Warren, that from the time you arrived home for Christmas, you stayed there until December 28, 1944?

The Witness: Yes.

The Court: And it was about December 28th that 132 you reported at the United States Marine Hospital at Detroit, wasn't it?

The Witness: January 28th, don't you mean? December 28th is only about three days after Christmas. It was January 28th.

Q. Some time in the latter part of January you went to the Detroit Hospital for observation, is that correct? A. I did.

The Court: In the meantime you were home,
weren't you? 133

The Witness: That is correct.

The Court: Did you have any expense for doctors or food while you were home?

The Witness: Well, I had an extra expense naturally. I couldn't get around. Everywhere I went I had to ride a taxicab. Well, that probably is off the record so far as that is concerned, but I had to soak my leg in liniment and massage it and I made a few trips to a doctor for massage.

The Court: What would you estimate the expense
for the doctors and medicines to be during this so- 134
journ at your home?

The Witness: Well, I have made the previous statement that said $100, but when I went to observe it a little closer I see that it probably wouldn't exceed $50.

Mr. Connor: At this point, your Honor, perhaps
I should make your Honor understand. I have an
objection to any private doctor's charges on the
theory that the Marine Hospital is the place where
merchant seamen receive their treatment, and if
they choose to go outside— 135

Mr. Sardaro: If the Marine Hospital is accessible.

Mr. Connor: —it is at their own expense.

y the Court:

Q. Where was your home? A. In Lansing.

Q. In Lansing, Michigan? A. That is correct.

Q. And how far was that from Detroit? A. Well, that
90 miles, approximately.

136 Q. Well if you, let us assume, paid $3 to a doctor for this treatment that you got in Lansing, the fare to Detroit and back would be more than double that, including your taxi fares? A. It would be double that easily.

The Court: I will overrule the objection.

Q. But you did not have any expense for food. You just lived at home with your parents, the way everybody else would? A. Well, I lived home with my family; naturally I have to pay for it and pay rent the same as any other man would do.

137 Q. Why didn't you say so? I am just asking you that. What did you pay home there? A. Well, at the time we was paying $30 a month for an apartment, and the food was probably was about $10 a week.

Q. Were you with your mother and father? A. No, with my wife.

Q. With your wife? A. Yes.

Q. So that the expense you had for your food and upkeep there was the ordinary routine and the general expense of buying the food and the ordinary expense of maintaining the apartment? A. Yes.

138 *By Mr. Sardaro*:

Q. How long did you live there under those circumstances? For what period of time? A. Oh, since before I went into the Merchant Marine, I guess.

Q. You misunderstand me. From December 21 when you left the Staten Island Hospital until what period of time did you live in the apartment with your wife and family? A. Well, the apartment was kept and maintained until March or April. I was in the hospital, I guess, when she closed the apartment. 139

Q. Throughout this period of time that you were in the hospital or that you were out of the hospital, between December and February, you stayed at home with your wife in that apartment? A. That is right.

Q. And you paid the rent? A. Yes.

Q. How much was the rent? A. $30 a month.

Q. And how much did you pay for your food? A. Well, that would be hard to say. When you buy the food for the family you buy whatever it takes, that's all.

Q. How many are there in the family? A. Three.

Q. That is including yourself? A. That is correct. 140

Q. What was the average weekly expense for food? A. Oh, probably $15 for food and $10 for rent—probably $25 a week.

> The Court: That is for the family, the $25 a week for the family?
>
> The Witness: Well, they wasn't there most of the time. I was keeping the place up for myself and I was eating out a lot, you know, but the apartment was maintained and it was there whenever they wanted to use it. 141
>
> The Court: So you met the $25 a week for yourself?
>
> The Witness: Practically. Most of it went for myself.

Q. Oh, Mr. Warren, we would like to get on the record if we possibly can an idea of how much it cost for you alone to

live during this period from December 21 to February 27
142 when you went back into the hospital. We would like to have that on a daily basis. About how much did you spend per day for your food and lodging? A. For food and lodging I should calculate $20 to $25 per week—probably twenty-five.

Q. That is for yourself alone? A. That is correct.

Q. Now on February 27th you went to the Detroit Marine Hospital for an operation? A. That is right.

Q. And how long were you there? A. I was there until May 28th, I believe.

Q. You did not pay for any medical expenses or food or
143 lodging while you were there, did you? A. No, not for myself, because it was furnished there.

Q. Then you left the Detroit Hospital sometime on May 28th or May 29th? A. I believe it was May 28th. I wouldn't say definitely or positively on that.

Mr. Sardaro: May I at this time, your Honor, offer in evidence the abstract of the Detroit Hospital?

The Court: Any objection?

Mr. Connor: I haven't any real objection except this, your Honor, that this is a statement of what
144 somebody thinks those hospital records show and what I would like to have done, if possible, is to have the original records offered when they arrive. This is only a copy of what some parts of the record show.

The Court: I am a little puzzled as to what the point of it is. Does it matter at all whether he was treated properly or improperly?

Mr. Connor: No, sir, that is not in the case at all.

Mr. Sardaro: All I am trying to prove, your Honor, is the fact that he received medical treatment and was disabled. That is all I want to prove, and that is all there is in the case. 145

The Court: I will receive this subject to further elucidation when the records arrive, if they arrive before the case is closed.

(Marked Libelant's Exhibit 1.)

Q. You left the United States Marine Hospital in Detroit on what date, about? A. The 28th of May, 1945.

Q. And from that, was any recommendation made as to when you were supposed to return to work? A. Well not exactly. They said that I was in shape to go to work whenever I could stand it, and I did go to work a month later on a light job where there wasn't much walking to do. 146

Q. Do you recall the date that you went to work? A. It was around the 1st of July, I guess.

Q. You did not work at all between the time you left the hospital to the 1st of July? A. That is right.

Q. Now what was the cost to you to live from May 29th to July 1st, per day or per week? A. Well, at that time I was living with my brother and eating all my meals out, so I presume that would probably figure about three or three-and-a-half a day for meals, and about 75 cents to a dollar a day for a room. Six days would be how much a day? 147

Q. I beg pardon? A. $6 per week would be about how much a day? That will be roughly 85 to 90 cents a day.

Q. You paid $6 a week for lodging and about $3.50 a day for food? A. Yes.

148 Q. Now in the latter part of January you went to the Detroit Hospital for observation? A. That is correct.

Mr. Connor: This is January 1945?
Mr. Sardaro: 1945.

Q. And did they suggest to you or did you request that you be sent back to New York for further observation here?

Mr. Connor: I object to that, if your Honor pleases, as not binding.
The Court: Objection overruled.

149 A. Why, I asked him what they thought about it, if he had any objections if I checked back with the New York Hospital and he said, "No, I would like to have you do it." He said, "If you are going to be there I would be pleased to have you do it."

The Court: If you are going where—to New York?
The Witness: To New York.

Q. And did you come to New York? A. I came to New York, yes.

150 Q. And you went to the Stapleton Hospital? A. To the Stapleton Hospital for an x-ray and observation again.

Q. And there what did they tell you? A. Exactly the same thing, and they said that they would do it there, or I could go back to Detroit and be closer to my home—either one I chose.

Q. And you went back to Detroit? A. I went back to Detroit.

Q. How much did it cost you for railroad fare from De-oit to New York and back? 151

> Mr. Connor: Well, I object to that, if your Honor please. I don't mind taking the figure, but I object to this—
>
> The Court: You see, you will have all your rights preserved to object to any of these items later.
>
> Mr. Connor: That is all right.
>
> The Court: However that may be, you have noted your objection and that will serve to make a record of it. I will overrule the objection without intending at this time to pass upon the question that I will have to pass on at the close of the case, namely, as to specific amounts and so on. 152

Q. Did you spend $25.86 for the railroad fare, round ip? A. I believe that is what it was at that time. It is ore now but I think it was $25.86 for a round trip ticket to etroit—from Detroit to New York.

Q. Mr. Warren, from October 30 to the present time have ou been paid the wages for the period, that is, from Octo-er 30th to the end of the voyage of the ship? A. Pardon?

Q. Have you been paid any wages for the period after ctober 30, 1944? A. No. 153

> Mr. Sardaro: I believe counsel will stipulate that the ship paid off at New York on December 23, 1944.
>
> Mr. Connor: That is right.
>
> Mr. Sardaro: And I have calculated the figures, the unearned wages for the period October 30th to December 23, 1944, at the rate of $87.50 per month to be $157.58.

154 Q. Mr. Warren, in the course of your service on the ship were you asked to render additional service—to serve additional people? A. Yes. We had—

Mr. Connor: Before we get into this point, your Honor, I am going to object to that as not part of the pleadings.

The Court: I do not understand what it is about.

Mr. Connor: It is a claim for overtime.

The Court: Overtime?

155 Mr. Connor: Wages for overtime, yes. The libel does not disclose any such claim. As a matter of fact if there were any such valid claim I would not be here defending it.

The Court: Let me just take a glance at the libel. This is overtime that he claims he would have earned if he had been back on the ship?

Mr. Connor: No. This is time that he says he did earn.

The Court: Overtime he earned before he got hurt?

Mr. Connor: Yes.

156 The Court: That is out. I will sustain the objection, unless I find it in the libel, which I gather I won't find, but, however, just let me look. (Examining.)

Mr. Sardaro: It is not in the libel, your Honor, and I will withdraw my question.

The Court: All right.

Mr Sardaro: I offer in evidence the notice of claim presented by the libelant to the American South African Line, Inc., general agent of the United States, and to the chief adjustor, War Shipping Administration, pursuant to the provisions of Public Law 17. 157

Mr. Connor: I have no objection, your Honor.

The Court: That is admitted in the pleadings as a matter of fact, isn't it?

Mr. Connor: The receipt of it is admitted, yes.

The Court: I will receive it.

(Marked Libelant's Exhibit 2.)

Mr. Sardaro. Mr. Connor, will you stipulate on the record that the ship has been in New York during the pendency of this lawsuit?

Mr. Connor: I have the answers to the interrogatories in which it is so stated. 158

Mr. Sardaro: I do not want to use them unless you want me to.

Mr. Connor: Surely. There is no doubt about the fact that this vessel, after the pendency of the libel, came to New York. You see, we have the jurisdictional point.

The Court: I know you have, so that at some time during the pendency of this proceeding the vessel was in the territorial waters of the United States and part of the Southern District of New York. 159

Mr. Connor: Yes.

The Court: And Mr. Sardaro claims that is all he has to show, and you say that is not all he has to show.

Mr. Connor: Yes.

Mr. Sardaro: And may I also bring to your Honor's attention the fact that the American South African Line is a resident of this district and a party to this action, and can only be sued in this district.

Mr. Connor: That does not relate to the point we are making here. It relates only to the United States of America. This suit has to be commenced in a district in which the vessel is found or in which the libelant resides; because there is some other residency in the case does not change it.

The Court: Why isn't that so, Mr. Sardaro?

Mr. Sardaro: I bring your Honor's attention to the case of Hong v. United States where a similar situation existed, and Judge Hulbert held that the Court had jurisdiction of the parties.

The Court: You find the page and hand it up to me. In the meantime we will take a ten-minute recess.

(Short recess.)

Mr. Sardaro: I should like to put in evidence, your Honor, the clinical abstract from the Staten Island Hospital.

Mr. Connor: As to that, here is the original record. I suggest, if your Honor please, that the original record go in, the one that we have.

Mr. Sardaro: I have not examined it. All I am offering this for is for the purpose of showing that he was told to lay off for six weeks and then report back.

Mr. Connor: I think this shows it anyway, if that is what you have in mind.

The Court: When was he told to lay off for six weeks?

Mr. Sardaro: On December 21, at the time he left the hospital.

Mr. Connor: That appears in the original record.

Mr. Sardaro: Will you stipulate then, for the record, that the record shows that he was told— 163

Mr. Connor: I will put the whole record in. I haven't read it.

Mr. Sardaro: I haven't read it and I am hesitant about putting it in without reading it.

The Court: We have proof here up to July 1, 1945. You seem to be going back, with this paper you are now offering, to some prior period, is that right?

Mr. Sardaro: That is right.

The Court: What is the prior period—at the time he left the Marine Hospital on May 28th?

Mr. Sardaro: The time he left on December 21 until he re-entered on February 27, 1945. 164

There are only two periods involved. Maintenance is claimed from December 21, 1944, to February 27, 1945, and from May 29, 1945 to July 1, 1945. Those are the only two periods involved.

The Court: I see that we are now back to the time that he left the hospital in Staten Island to go to Detroit.

Mr. Sardaro: That is right.

The Court: December 21, 1944, is that right?

Mr. Sardaro: Yes. 165

The Court: Let me see the paper that you are offering.

(Mr. Sardaro hands paper to Court.)

The Court: You prefer this paper to the original record that Mr. Connor has there, I take it?

Mr. Sardaro: I do, your Honor.

The Court: I will receive this, and of course Mr. Connor may cross examine or put in such other papers as he wants to later on. 166

(Marked Libelant's Exhibit 3.)

By Mr. Sardaro:

Q. Mr. Warren, will you please tell us the circumstances under which you joined the Anna Howard Shaw? A. The circumstances?

Q. Well, did you go the Union Hall? A. Yes.

Q. And did you receive a slip to report to the ship? A. 167 That is correct.

Q. Do you recall the date? A. No, but I have the original slip right in my pocket. Strange as it seems I found it in my papers.

Q. Let me see it. A. Right there. It happens to be the original slip from the Union Hall (handing).

Mr. Sardaro: It is not material.

The Court: Then don't put it in evidence. I do not see that it has any bearing on the case.

Q. Mr. Warren, at the time you were given this slip were 168 you told to report to the ship?

Mr. Connor: If your Honor please, so far as I know this is developing testimony of what was said to him in the Union Hall. I do not see how it can bind us.

The Court: He has not come to that. So far he said that he—

Mr. Connor: Well, the last question was what he was told. 169

The Court: Suppose he was told or he wasn't told. I cannot see what difference it makes. He was undoubtedly on board the ship.

Mr. Sardaro: The question was raised by Mr. Connor that the South African Line may not be liable because it was the agent of the United States.

The Court: Very well. I will overrule the objection.

Mr. Sardaro: I will say this, that the American South African Line is in the shoes of the United States and is as much responsible for the mainten- 170 ance and care of this man as is the United States. That is what I want to prove from this man, the fact of how he came to be employed. Other than that I have no reason to offer the testimony.

The Court: So far the record is barren of any proof with relation to this respondent, the American South African Line, Inc. I should think it would be more important for you to show what the relationship of that respondent was to the vessel than merely to show that this man reported on the ship, which he already testified he was there as a messman; but I 171 am not disposed to limit you at all. If you want to put the slip in evidence go ahead and put it in.

Mr. Sardaro: The slip is of no material importance, your Honor.

The Court: Very well. Do you have something in your admissions of the answers which will show the relationship of the American South African Line, Inc.?

Mr. Sardaro: The answer of the respondents
172 admits that the American South African Line is the
agent of the United States.

The Court: And the general agent of the vessel.

Mr. Sardaro: And the general agent of the vessel.

Mr. Connor: I would like to have my attention
directed to that. We were what is technically known
as a general agent under a contract but we were not
the general agent of the United States in the general-
ly accepted sense of the word. There has been a great
deal of dispute about this, your Honor, and this is
173 one of the reasons I did not want to discuss the other
legal matter that came up before. There are two
cases dealing with that situation in the Supreme
Court, namely, the liability of the general agent, and
that has a specific meaning with regard to the rights
of seamen. One is the case of—

The Court: Yes, I have been trying cases where the contract was put in evidence. Have you a contract here so that we can put it in evidence?

Mr. Sardaro: I do not have it.

Mr. Connor: I do not have it. We have denied, so
far as the American South African Line is concerned,
174 ownership, operation and control of the vessel and
employment of the libelant. It seems to me it is up to
the libelant—the United States admits it employed
him. It admits it owned and operated the vessel.

The Court: Well, I am not going to throw this case out on some technicality when some proof can be supplied readily that will suffice to hold one of the respondents. If we can have that contract in, we will get it.

Mr. Connor: I am not suggesting that your Honor throw it out on any technicality. I hope your Honor won't feel because I have said that that I am relying on any technicality. 175

The Court: Well, I confess that impression has taken a certain lodgement in my mind.

Mr. Connor: I wish to disabuse your Honor of that because that is not so. There is a definite liability on the part of the ship and its owner and the employer of a seaman for maintenance. He has his remedy against that owner and employer. My position here is that he has that person in the form of the United States of America; that the American South African Line does not have that liability, and if liability is fastened upon it, it is not put upon the right person. It is put upon somebody who does not have the responsibility. It is put upon that person on the theory that mere title of general agency makes it a different entity before the law than it was. We maintain— 176

The Court: All I am saying is if it is a question of some proof we will take the time necessary to get the proof, and that proof apparently is a contract. Mr. Sardaro says he has not got a copy of that contract, but he can readily get one in evidence. 177

Mr. Connor: Your Honor, I am not trying to conceal the contract, no. The contract is a standard one. The Government got out a book of some 30 or 40 contracts, one of which is known as a general agency contract. It is a contract that existed between this Steamship Company and the United States and every other steamship company. Your Honor can

178 get the exact same contract by getting a book of it issued by the Government during the war, which printed all the contracts.

The Court: Why don't you stipulate that?

Mr. Sardaro: May I suggest this: I have a copy of the book that Mr. Connor talks about. I know exactly what page that agreement is on—page 326-337. It is called a G.A.A. Contract.

I will be glad to stipulate with counsel—

The Court: This will take care of it:

179 It is stipulated by the respective advocates that the contract just referred to be deemed in evidence, and that pursuant to the terms of that contract the American South African Line, Inc., at the times referred to in the testimony here, operated the S.S. Anna Howard Shaw.

Mr. Connor: I have difficulty with that, your Honor. We will concede that we were general agent under the terms of the general agency agreement, but we do not admit operation.

Mr. Sardaro: Will you admit that you handled the business of the vessel pursuant to the contract?

180 Mr. Connor: We will admit that the terms of the contract as they have been incorporated bound us. I will produce the contract, and whatever your Honor says was our responsibility, based on that contract, of course I am bound to accept, but it is not operation in the true sense of the word. Let me say this to your Honor so that you will see what I am talking about: Under the terms of the contract the general agent was required to get a master of the vessel. Now that master was thereupon chosen by the United

States of America, and that master selected the crew, and the contract provides that the crew shall be employees of the United States of America. The contract was drawn specifically so that the general agent would not be the employer of the members of the crew. They had that very thought in mind when the contract was drawn to avoid this very type of litigation. The Supreme Court of the United States confirmed a decision in the Court of Appeals. When I say that I mean the New York Court of Appeals in the Calderaldo case held that they were not the employers of the crew on the vessel. 181

Mr. Sardaro: That is not so, your Honor. 182

The Court: Let us not spend too much time arguing that. You have both agreed that the contract be deemed in evidence, haven't you?

Mr. Connor: Yes.

The Court: You also, Mr. Sardaro?

Mr. Sardaro: Yes, I do.

The Court: What they did under the contract is conceded to be what the contract provided they were to do—isn't that right?

Mr. Connor: Yes, sir.

The Court: So that the interpretation of that we can take up later. 183

Mr. Sardaro: Right.

The Court: But it is now in evidence by stipulation that there was this contract, and that whatever the contract provided should be the duties of the American South African Line, Inc., the American South African Line did.

Mr. Connor: I will get the actual contract.

184 The Court: All right.

Mr. Sardaro: I have two copies of that book, you
Honor, and if you want I will be glad to bring the
in here.

The Court: I am just concerned at the mome
that this case should not be dismissed through som
failure of proof that is readily available, and if som
dispute comes up later about this that might resu
in a dismissal on some point that can be cured by ev
dence, I will tell you gentlemen now that I am goin
to see that that evidence gets in; but if fundamentall
185 the facts require dismissal, why I will have to di
miss.

By Mr. Sardaro:

Q. Mr. Warren, when you reported to the ship did yo
know who you were going to work for? A. Yes. I kne
I was going on the Anna Howard Shaw for a company b
the name of American South African Lines.

Mr. Sardaro: You may inquire.

186 *Cross Examination by Mr. Connor:*

Q. I do not think, Mr. Warren, that you told us where yo
live now. Will you do that? A. I live in Lansing, Mich
gan. Do you want the street address, too?

Q. Yes, please. A. 528 South Grand, Lansing, Michiga

Q. At the time that you joined the ship Anna Howar
Shaw, where did you live? A. 324 Howell Street in th
same city.

Q. Did you continue to remain there after April of 1945?
A. No. After April of 1945, no, the apartment in the house 187
belonged to my brother and he sold it and bought another
place, and that is why the residence was changed.

Q. In any event, from the time that you joined this vessel until the time, today, you have lived in the State of Michigan, is that correct? A. That is correct.

Q. And you regard that State as your residence? A. After all, it is a possession of the United States, isn't it?

Q. But nonetheless it is where— A. That is where I live.

Q. —your home is? A. And where I intend to live, for 188
the time being at least.

Q. Would you have any idea, Mr. Warren, about how far it was from the time that you landed from your vessel in Magnolia, Italy, to the place you had your accident? A. Well, that would depend on which way you want the distance. Do you want the distance as we traveled it?

Q. Yes. A. Or the distance as a straight line?

Q. No. Take it as the distance you traveled first. A. The distance as we traveled it, perhaps, from the shoreline, three miles. That is a rough calculation. I can't get it any closer than that calculation.

Q. During the time that you were going from the place 189
where you landed to the place where you had your accident,
were you walking along public streets? A. Yes. We was
up one street and down the other one, and window shopping,
looking at everything we could see out of curiosity.

Q. And along this street you saw either all local residents, did you, and vehicle traffic? A. Well, there was very little vehicle traffic. I did not see anything. I saw

streetcars with no electricity to run them, and most every-
190 body was foot pedestrians.

Q. But there were shops and stores and private houses
all along the route? A. There was all types of places, just
like ordinary towns—there would be, and ravished by war,
and not in too good condition any of them.

Q. Did you see some areas which were bombed out, houses
which were destroyed by warfare, or bombs? A. No, there
was some slight evidences of the war, but most of it had been
repaired.

Q. Did you see some houses which were partially de-
stroyed or rubble about the street? A. No. The streets
191 were pretty well cleaned up. You could see houses and
chimneys knocked off of them and one thing and another,
but the rubble had been cleaned off the streets.

Q. Let me put it to you this way: there was some evi-
dence that a war had been going on in the immediate vicinity
of that place? A. Well, the largest evidence was the rav-
ished, poor people with hardly enough food or clothing.

Q. I am talking about the structures. A. Of course the
structures, I never saw it before the war, but you could see
things in your mind, you would figure was caused by the
war.

192 Q. If I understand you correctly, you landed at a small
pier at the city or town of Magnolia? A. That was what
we was told the name of the town was, that is all we know.

Q. In any event it was a small pier— A. It was a small
village, perhaps comparable to a suburb of one of our cities.

Q. I am trying to find out what kind of a structure did you
land at. Did you beach your boat and then walk? A. No,
nothing of that kind. We went up alongside of a shallow
dock and stepped up on it.

Q. Were there any military personnel around there at the time? A. Nothing but Army MPs. 193

Q. American soliders? A. That is right.

Q. I want to jump a little bit ahead of myself and go to this place where you said it was something like a U.S.O. You do not contend that this place where you were at was any place run by the United States of America or a U.S.O.? A. No. I said it was a place probably comparable to what we would have as a U.S.O. I mean that is what I would fix it at because the village people on the Italian streets weren't even dressed to go to a place of that type, and the people that were in there were American soldiers and people fairly well dressed. You can pass your judgment on that that it wasn't a place of the lowest class type, and the building was in fair condition, as I recall it, a good hardwood floor and fair condition to dance on. 194

Q. The people who were sitting at your table, I think you said were Italians? A. Well, there was a couple of Italians.

Q. Were those— A. There was one Italian woman there that was a school teacher, and she talked English, and the rest of them, of course we couldn't talk to, but I was talking to her.

Q. Were the other people who were at your table ladies, too? A. They were ladies that the boys had been dancing with. 195

Q. You danced with these ladies yourself? A. Well, I do not recall whether I danced with all of them or not, but I danced with three or four different ones.

Q. Were you and your two companions the only men from the merchant marine in that establishment at that time? A. I didn't see any others. The rest of them were Army

boys, I believe, Army or paratroopers, the rest of the
196 Americans.

Q. Were there any signs posted anywhere near the building saying that that place was off limits for Army personnel? A. There did not seem to be because if it had been off limits for Army, the MPs outside in the jeep would sure have picked them up and took them outside in a hurry.

The Court: There were a lot of American soldiers in there?

The Witness: Well, there wasn't a lot of them. There were five or six, I judge, but outside in the
197 street there stood a jeep with a couple of MPs in it, and I talked to them casually.

Q. You said that after you were there an hour or so you noticed that in some other room there were some doors which faced the bay or the water, it that so? A. That is correct.

Q. Did you go alone into that other room? A. Well, with the bunch I was with I did, but there were other people in there, which were Italian people that I couldn't talk to and I paid no attention to. There was probably half a dozen walking around in there.

198 Q. If I understand what you said before, you saw large French doors which faced on the water? A. That is right.

Q. Were those doors open or closed when you approached them? A. They were open and the breeze was blowing in. Supposing that wall right there (indicating) faces the sea water, and then your panels there would open up, it would be something comparable to that.

Q. Was the floor in that room wooden? A. Yes, it was.

Q. And then beyond that opening there was a ledge, is that what you say? A. Yes, a slight ledge, yes. 199

Q. Did you tell us how wide that ledge was? A. I couldn't tell you exactly, only by calculation.

Q. Just approximately. A. I judge 2-½ to 3 feet.

Q. What was the ledge constructed of, wood or stone? A. It was probably the same type of material as the—I don't recall whether it was constructed of wood or stone or whether the floor had a separation in it.

Q. And you say that out there you saw some sort of a column which was constructed of masonry of some sort? A. Well, they were regular parts of the building. Most every building has masonry posts in them. 200

Q. You think this was a decorative column that was in front on the building?

The Court: Not in front of the building; it was this window.

A. That would be the rear of the building facing the sea, wouldn't it? The front of it would be on the street.

Q. Well, I don't know. But you say there was no railing around the outside? A. There was no railing, no.

Q. And when you went out there did you go out with any companions—I mean a girl companion, or did you go out alone? A. No, I was just looking out there alone. There were other people going over and looking and walking away. I wasn't interested in them. I was looking at the water hit the stone there and the spray over it. That is a beautiful scenery there so ~~far as~~ that spray—you can see the Isle of Capri off to the left and a lot of historic places, if you know what they are. 201

Q. As I understand it, you actually walked out on the
202 ledge? A. That is right, and stood there for a few seconds looking around.

Q. You mean you stood inside the room or you went out on the ledge? A. I stood in the tracks where I fell, probably for about three or four minutes, or maybe five minutes, before I took a hold of this iron and looked over and it pulled loose so easily that it was such a quick surprise that I couldn't recover myself.

Q. I still do not know whether before you took a hold of that pipe, or whatever it was, you were standing within the walls of the room or whether you were out on the ledge.
203 A. Well, I don't know exactly either. If you were standing here with something else on your mind would you observe the exact structure of everything around? I am sure I wouldn't.

Q. What you are telling me now, I take it, is that you did not notice whether you were in the room or out on the ledge? A. I am only telling you what I remember and what I can recall.

Q. I anticipate that, but do you recall this particularly, whether you were in the room or out on the ledge? A. Well, I was possibly outside of the door entrance which
204 would be the edge of the room, probably 2-½ to 3 feet. That is what you would call the edge of the room. Would you call the edge of the building the edge of that room?

Q. I am trying to distinguish between the doorway and the ledge itself and find out whether you were within the doorway or whether you were actually outside on the ledge? A. Perhaps I was outside the door a couple of feet.

Q. That is your best recollection? A. That is correct, because I had something else in my mind. I wasn't even paying any attention to that.

Q. We will come to that in a minute. What was this thing that you say you took a hold of? A. Well, to be honest with you I don't know. It would be comparable to a lightning arrester or lightning rod on one of our buildings. 205

Q. You mean a thin metal pipe of some kind? A. Well, a pipe, probably about a half inch in circumference, and the section that pulled off was 8 or 10 feet long, maybe 12.

Q. And did that go up above the window or the doorway, rather? A. It ran up the post on the side of which I was standing.

Q. Did you notice whether or not it was fastened to the post at all? A. It would have held it up there, wouldn't it?

Q. You see, you are asking me questions, Mr. Warren. Unfortunately you are the one who has to answer them. What do you say about it? Were there any brackets up there against the post? A. It wouldn't have stood up in that wind if it hadn't had brackets, that is sure. 206

Q. You still haven't told us whether there were brackets. A. There were brackets on it.

Q. What kind of brackets were they? A. Some kind of metal brackets fastened in the masonry, and they probably had been fastened too long by the way they come loose.

Q. Did you make any inspection of this pipe or the brackets before you took a hold of it? 207

Mr. Sardaro: If your Honor pleases, I am going to object to that. I think that Mr. Connor is going far afield in this cross examination. It has no bearing upon the issues in the case.

The Court: Well, it puzzles me a little bit, too, but I am not disposed to interfere with cross examination. I will overrule the objection.

Mr. Connor: Will you repeat the question?

208 Q. (Read.) A. Why, just casually. As you would glance on it, if it would look all right, you wouldn't make any note of it hanging loose at a glance. Naturally you wouldn't make a very close observation.

Q. It was not something that you thought was put there for the purpose of taking a hold of by the hand? A. Well, it may have been there for that purpose.

Q. You do not know whether it was there for that purpose? A. I do not know whether it was there for that purpose, but it may have been something of that type rather than a lightning rod or something of that type.

209 Q. Was there anything about the structure which would lead you to suppose that it was there because somebody want to hold on to it rather than for some other reason? A. On second thought it seemed to have—it went nowhere near the length of the floor. It was probably more of a hand-hold than anything else.

Q. And you think because it went from the floor of the ledge up above you that it was something to hold on to? A. It possibly was for that purpose more than any other reason.

Q. What you are telling us now, I take it, is something that you have considered this structure and this attachment to the post and you now think it may have been there to hold on to? A. From your remarks and one thing or another you bring out points that I did not think of before, and perhaps maybe you are more correct than my first observation. 210

Q. You understand, Mr. Warren, I am not giving any testimony here; I am trying to find out the facts. A. Well, that is true. That is probably what you are after, but you do give a person ideas from the questions you ask.

Q. You say that you were in this place about an hour or an hour and a half before this accident happened? A. I really did not look at my watch or anything of that type but we couldn't have been there more than an hour to an hour and a half at the very limit. 211

Q. From what I understand what you said before, you had been in one wine shop of some sort and had had part of a 12-ounce bottle of wine, is that correct? A. That is correct.

Q. And then you say that you had another similar quantity of it in this place where you had your accident? A. That is correct.

Q. So that altogether you had something like 8 ounces of wine? A. That would probably be a large estimate. 212

Q. Did that wine have any effect upon you so as to make you unstable on your feet so that you could not walk correctly? A. No.

Q. Have you ever had a little too much to drink? A. Why, I recall once or twice, but it has been years ago.

Q. Did you have too much to drink on this occasion? A. No.

Q. Did you get actually drunk from alcohol on this occasion? A. No.

Q. Do you know that the Army Hospital records has you marked as being in a condition of acute alcoholism on this very day when you had your accident? A. I don't know how that could be, sir. 213

Q. Do you know that the Stapleton Marine Hospital records carries a statement that your accident came about when you were under the influence of acute alcoholism? A. I don't know how that could be either unless it is just information that was passed along from one hospital to the other.

Q. Do you say that the Army doctors put down acute
214 alcoholism when it wasn't so?

Mr. Sardaro: If your Honor please, I object to the form of the question and also—

The Court: I will sustain that objection.

Q. Let me see if this helps you on your recollection, Mr. Warren. I am now reading from a part of the United States Marine Hospital record at Stapleton, Staten Island, which evidently comes from the—transferred with the patient from Italy.

215

Mr. Sardaro: May I suggest, your Honor—

Q. This is dated October 30, 1944, and the hour is 1830. "Treatment given at about 1700 hours"—

Mr. Sardaro: If your Honor please, may I register my objection first? I object to Mr. Connor reading any part of a record not in evidence—

The Court: Well, until he finishes his question I suppose I should not rule on it. But I suppose that is a valid objection.

216 Mr. Connor: If that is the only objection I offer all these hospital records in evidence. There is a case in this circuit, your Honor—

The Court: You do not have to argue it. He is not going to object and they are all going right in.

We will call this the entire file of the hospital records from the United States Marine Hospital at Stapleton.

Mr. Connor: Yes. 217

(Marked Respondents' Exhibit A.)

The Court: Very well. You may pursue your inquiry.

Q. I am now reading from the record of the 118th Station Hospital, signed by Captain Harold C. Hayne:

> "Treatment given. About 5 miles north of Naples at about 1700 hours, 30th October 1944, alcoholism, acute. Patient treated at 225 Station Hospital but sent him here. S"— 218

with a line over it. I think it means "without"—

> "any amt or record of any kind."

Mr. Sardaro: May I see it?
Mr. Connor: Surely (handing).

Q. Does that statement in the record, Mr. Warren, help you to remember how much alcohol you consumed that day? A. That only convinces me of one thing, that I never seen a doctor for three days after I was in that hospital and I don't know how a man could observe a man and sign that copy or a slip of that type without ever seeing him. 219

Q. You see, you have not answered the question I put to you. I say, does this record help your recollection any as to how much alcohol you consumed that day? A. Well, I am not an acute drinker and I never have been, and I didn't consume any amount in excess of what I told you that day.

220 The Court: You weren't even mildly under the influence?

The Witness: I would say not, unless they give me morphine—I asked for morphine when my leg was hurting, I was laying there and I got wet from sea water, and it splashed up over me and I asked for morphine, and unless they took it from being dopey, from morphine, that I was drunk, and I was handled by sergeants and Italian stretcher bearers in Naples and I never saw a doctor for three days. In fact, even a sergeant and a corporal put the cast on my leg.

221

Q. Now on October 30th that is the time you had your accident, isn't that correct? A. That is correct.

Q. And it happened about 1700 hours, didn't it, according to Army time? A. That would probably be somewhere in there.

Q. That would be about five o'clock, wouldn't it? A. Well, they could get that time off because I really didn't get to the hospital until 11 or 12 o'clock at night and I was practically froze at night and everything else.

222 The Court: Does that say 1650 on there, Mr. Connor?

Mr. Connor: You mean the hour?

The Court: Yes.

Mr. Connor: 1700 it says there.

The Court: What time would that be?

Mr. Sardaro: 5 o'clock.

The Court: I noticed another one here said 1630.

Mr. Sardaro: That would be 4:30.

The Court: When I say "another one" I mean another one of the papers taken from this little envelope which you have referred to as being transmitted from overseas, and which contains the papers that you have been examining the witness about. 223

Mr. Connor: I think I ought to specially have this marked as A-1 so that we can distinguish it.

The Court: Yes.

(Marked Respondents' Exhibit A-1.)

Mr. Connor: If your Honor please, I have not seen these records before. This is the first time I ever laid eyes on them. 224

The Court: You may glance at them.

Mr. Connor: I do not want your Honor to think I was delaying.

The Court: No, you are not delaying anything.

Q. Where was it that you say you were taken to after the jeep picked you up? A. I don't have any idea but I ended up five or six hours later in the 118th Evacuation Hospital.

Q. Did you get into the hospital about eight o'clock that night? A. Why, as I say, I asked for morphine to cut that pain down. 225

Q. You see, Mr. Warren, you and I are not getting along well together. What I asked you about was: did you get to the hospital at 8 o'clock that night, and you are telling me about some morphine.

Let me ask you that again: did you get to the hospital at about 8 o'clock that night? A. Why, I don't believe it was until later in the evening, 10.30 or 11.

Q. I am looking at a record here, Mr. Warren, from that
226 same overseas hospital, which indicates you got into the hospital at 8 p.m. A. Well, I probably lay down outside on a stretcher for two or three hours. I know it was about 10.30 or 11 o'clock before I got to bed, and I was so blooming cold over there, I put blankets over my sweater to keep from freezing to death.

Q. Wasn't it 11 a.m. the next morning before you got any morphine? A. No.

Q. Well, if the record indicates that do you think the record is wrong? A. I did definitely, because I asked the
227 Army boys and I remember them breaking a tube and sticking morphine in my arm while I was back in the jeep.

Q. And you say that you got the morphine in the jeep? A. That is what I asked for. I said, "This pain is so bad that I can't stand it. Do you have any morphine?" And I remember them breaking a glass tube and shoving morphine in my right arm.

Q. When was it that the pain got so severe? A. I don't know that it was any more severe than it was all the time.

Q. Didn't you tell us in your direct examination that you could have gotten up and walked but your buddies wouldn't let you? Isn't that what you said before? A. That is cor-
228 rect. If I had one leg—if I could find something to hold on to.

Q. I think what you were trying to tell us before, wasn't it, you probably were able to walk without having a litter brought to you? A. Well, I probably miscalculated slightly on that. You know, you always think you can do things you can't after you get hurt.

(Discussion re adjournment.)

The Court: We will adjourn until 10.30 tomorrow morning. 229

(Adjourned to October 30, 1947, at 10.30 a. m.)

New York, October 30, 1947;
10.30 o'clock a. m.

(Trial resumed.)

(Discussion.) 230

Walter K. Warren, resumed the stand.

Cross Examination by Mr. Connor (Continued):

Q. I think you told us yesterday, Mr. Warren, that it was three days before you saw a doctor after your accident; is that so? A. Well, it was quite a good while anyway.

Q. You see, you are not going to answer the question again.

> The Court: Yes. You will have to answer these questions. I let you fool around all you wanted to yesterday. Now your answer is that you did say that yesterday or you didn't? 231
>
> The Witness: Yes, I did.

Q. When did you get the plast cast put on your leg? A. Well, two or three days afterward. They let the swelling go down first some.

232 Q. Would it surprise you to know that the records of the Army Hospital show that the cast was put on on the 31st of October, the day after your accident? A. It may have been the day afterward but I thought they waited another day. I am not sure.

Q. You are not suggesting that your leg was set and a cast put on by somebody other than a doctor?

> Mr. Sardaro: If your Honor please, I object to that.

A. That is right.

233

> The Court: He did say that. He said it was placed on by a sergeant or a corporal.
>
> The Witness: A sergeant or a corporal, and I never saw a doctor until the day after the cast was put on.
>
> The Court: That is what he said yesterday.

Q. Now do you remember when you were sent out of that first Army Hospital you were transferred to Casablanca? A. That is correct.

234 Q. And you were transferred with several other men, were you? A. Yes.

Q. Were they merchant mariners like yourself or were they Army or Navy personnel? A. They were all Army personnel, I think, but one other merchant seaman.

Q. When you went to Casablanca you first went to another Army Base or Medical Base, didn't you? A. Yes, the 56th Station Hospital.

Q. When you got in there was any examination made of you? A. I don't recollect it, no; I don't believe so.

Q. Did anybody ask you what was the matter with you? A. No. 235

Q. Did you carry any papers with you? A. Yes, there was papers, records, I think. They sent them right with us.

Q. You had a little envelope, didn't you, with a string and that was fastened to your blouse or your shirt in some way, or your coat? A. I don't know how they did arrange it or whether they gave it to them, but I had an envelope anyway.

Q. Do you know whether this is the envelope that I show you now? Isn't this the envelope that you carried around with you from Italy to Casablanca (handing)? A. I wouldn't say for sure. It may have been. 236

Q. Does it look like it? A. Well, I wouldn't recall that for sure because it has been quite a while ago and I wouldn't pay much attention.

Q. These were the papers that were in—this is the envelope that contained the papers about your condition, isn't that so? A. That is probably the case record.

Q. And you carried records of your case to Miami, didn't you, from Casablanca, and then at the Jackson Hospital you turned those papers over to the doctors there, didn't you? A. They were left in the office.

Q. Yes. Now when you came from the Jackson Memorial Hospital to New York you carried the papers to New York with you, didn't you? A. We carried the x-rays. I wouldn't say whether we carried that envelope of papers. 237

Q. Don't you know whether you carried this envelope with you? A. I don't know for sure. I know we had the x-ray pictures anyway.

Q. The fact that this envelope of papers—which are in evidence—were part of this Stapleton Hospital records,

does that help you to remember that you were the one who
238 brought those papers to Stapleton with you? A. Well, we were instructed not to look at that just because they were official records.

Q. Wait a minute. The question I asked you, Mr. Warren, is whether or not the fact that this envelope and the papers were part of the Stapleton record, does that help you to remember that you are the one who brought them to Stapleton? A. Well, if they were in that envelope they were in it because I had another envelope with x-ray pictures and probably the other envelope was with them—no doubt it was.

239 Q. And you brought them to Stapleton? A. That is correct.

Q. And you say that although you carried these at least from the Jackson Memorial Hospital to Stapleton that you never opened the envelope and never looked to see what was in them? A. I did not.

Q. Did you ever open them between your base in Italy and Casablanca to see what was in them? A. No, we did not have any chance in most cases.

Q. Well, you were traveling by plane, weren't you? A. Yes, in a plane where we did not have room to turn over, in
240 stretchers.

Q. When you got to Casablanca and between Casablanca and Florida did you look at the papers? A. I believe we were instructed to turn them in to the medical officers upon arrival.

Q. At any time when you had these papers in your possession did you ever look them over? A. No, I did not.

Q. You knew that you were carrying medical records of your case, didn't you? A. That is right.

Q. Now I want to go back to the time that you entered this cafe or whatever it was, the dance hall; you and your two companions came in, if I understand your testimony, and selected a table at which you sat, is that right? A. I think we danced, the first thing we did when we came in. We probably, between music, went down and sat at a table later on. 241

Q. You said the first thing you did was to dance, is that what you say? A. I believe so—yes.

Q. How did you get partners to dance with? A. Well, they were just standing around there and if you couldn't talk to them you could smile at them. 242

Q. You mean there were some native women there and in some way or other you were able to persuade them, by glances or words, to dance with you? A. Occasionally one could talk English.

The Court: Or vice versa. Maybe they were the ones.

Q. All right, I will take it either way. That is so, isn't it? A. Yes.

Q. Now how many women were there standing around there? A. Oh, there wasn't an awful big crowd of either. There was probably eight or ten Americans around there and probably eight or ten Italian women. 243

Q. Now some time after the first dance or so you sat down at a table at which you consumed some wine, I think you said? A. Yes.

Q. And during the time that you were sitting at the table you said some of these women were sitting there with you? A. Yes, there was two or three.

Q. Did you buy any wine for the women?

244

Mr. Sardaro: If your Honor please, I object as not bearing upon the issue. I think he has gone far enough on this.

The Court: Overruled.

A. I don't believe they drank, when I come to think of it.

Q. So that you were with these women and danced with them and all that you and your companions had during the hour and a half or so before your accident, while you were in the room, was a 12-ounce bottle of wine? A. I think

245 they served it in small glasses there.

Q. All right. You had one small glass, you said? A. That is all I recall.

Q. And what about your companions? Is that all they had, too? A. Yes, that is all—they only drank when I did.

Q. Now after this hour and a half or so you got up and went to this room where the open window or open French doors were located; right? A. Yes.

Q. And you said yesterday—I am just bringing you up to this point so you will know what I am getting at—you approached the doors and looked out and then later stepped

246 on the ledge, is that right? A. I did not open the door.

Q. No, I am not suggesting you did. You said the doors were open. A. The doors were open practically across the whole side.

Q. All I want to do is get you out on the ledge. You did step out on the ledge, didn't you? A. Why certainly. If it is beyond the doors I would have had to.

Q. How far from the outside of the ledge did you step?

A. Well, I perhaps walked up within six inches to a foot of the edge. 247

Q. While you were standing there could you tell, without looking down, about how far it was below you before you reached the ground? A. What was that again?

Q. While you were standing on the ledge could you look down and see how far it was to the ground? A. Well, you could look down but it would only be a calculation of distance.

Q. When you looked down how much do you calculate it was below you? A. Well, that is very hard to tell. I figured about 15 feet to the first ledge and maybe 20 on.

248

Q. So that you had something in the neighborhood of a 30-foot drop below you there, is that right? A. That is only a calculation without measuring it. The distance can be deceiving.

Q. I am taking your calculation. Your best estimate is about 30 to 35, is that correct? A. That is correct.

Q. Now I think you said that while you were standing on the ledge you took a hold of a pipe or a bar of some sort and you leaned over, is that so? A. That is correct, if I understand—if I remember right.

Q. And what you say, as I understand it, is that as you were leaning over the edge—as I am standing on the platform here (indicating)—just as you were standing on the ledge—do you see my feet—about where you were standing with regard to the edge of the ledge? Look at that, will you, Mr. Warren, and see (indicating). A. Six inches to a foot, yes. 249

Q. Do you want to come down and show us how you found that space you had there?

250 The Court: He does not want to particularly, but if you want him to do so and if there is no objection—but I do not see what difference it makes how careless he was.

Mr. Connor: That is the very point I am making. I am glad your Honor has picked it up.

Mr. Sardaro: May I ask your Honor if Mr. Connor is raising the issue, the fact that he looks over constitutes gross negligence on the part of the man?

Mr. Connor: Yes, that is the very question.

Mr. Sardaro: Then I object to the question.

251 The Court: If that is the purpose of the testimony I will overrule the objection.

Mr. Warren, you get down there. You have had several ideas well planted now. You get down there and show just how you did this.

The Witness: Supposing I don't know, your Honor.

The Court: Then you will have to just say so.

The Witness: That is about all I can say is I don't know.

The Court: You walk all right now, don't you?

252 The Witness: Yes, all but going up and down stairs.

The Court: You were pretty lucky to get out of that as you did.

The Witness: I suppose so. Supposing the rail was up here like that (indicating).

Q. Let me see what you have done and describe it so that we have it on the record. You extend your right hand out and somewhat above your head, is that right? A. The post would probably be close to the edge of the ledge.

The Court: This is hypothetical. What the libelant is doing is he is saying he does not remember exactly but he is trying to construct it as it must have happened. 253

Is that what you are trying to say?

The Witness: Yes. If I was about right up here (indicating) and grabbed the iron with the idea it was up there solid, and reach out to it, all at once it pulled loose, which would overbalance you and me, isn't that so?

The Court: I will make a statement on the record: The libelant is standing on the platform here with his toes about six inches from the edge, and as he testified a moment ago he held his right hand up to about the level with his head, or maybe two or three inches higher, and to the right of his body, indicating the he had grasped this rod coming down the outside of this building, a distance projecting an inch or two from the edge of the ledge, and then he bent forward, still retaining his right hand on the imaginary pipe, and indicated that that was how he fell. 254

Mr. Connor: Did your Honor observe the position of his head with relation to the edge of the ledge? 255

The Court: Yes, it was bent over.

Mr. Connor: Beyond it.

The Court: Beyond it looking down.

Mr. Connor: Thank you very much.

(Witness resumes the witness stand.)

Mr. Connor: I think that is all, your Honor.

The Court: Any redirect?

Redirect Examination by Mr. Sardaro:

256

Q. Just one question, Mr. Warren. How soon after the accident did you ask the boys in the jeep to give you a shot of morphine in the arm? A. Well, it probably was 15 or 20 minutes because I had to wait down there. Mr. Barr was the first one down and I had to wait for the boys to come around in a stretcher. They had to go down the beach a ways and come back.

Q. Do you recall who gave you that shot of morphine? A. It was one of the Army boys.

Q. He had it in a kit? A. Yes, in the first aid kits.

257 Q. As I understand it, the two men who were with you from the ship were the ship's carpenter? A. Yes.

Q. Do you remember his name? A. No, I don't.

Q. And another messman—do you remember his name? A. James Barr, yes.

> Mr. Sardaro: I should like to read into the record from the answers to the interrogatories given by the respondent, the answer to question No. 5.
>
> The question is: "State what entries are made in the official log or the deck log of the ship with respect to the injury." 258
>
> The answer says: "On October 30, 1944, at Naples, Italy, Walter K. Warren, messman, on this date injured himself in fall; sent to 118th Station Hospital, Naples, Italy, for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter, and James M. Barr, messman, stated Warren was sober. Injury apparently accidental. Signed P. One White, Master."

Q. Mr. Warren, one more thing I think we should clarify. How long was this ledge that you stepped out on? A. Well, it was quite a good length. It was probably to the nearest calculation about three or four sets of doors, with a post between or some setup of that type, and practically the whole back to the sea wall was opened up. 259

Q. Was there a roof overhead? A. Oh, yes.

Q. And these posts held up the roof? A. That is right.

Mr. Connor: I object to that. There is no such testimony.

The Court: You mean there was a roof just over over the ledge or a roof on top of the building? 260

The Witness: There was a roof over the building just like there would be here.

The Court: Yes. You did not mean there was a roof over the top of the ledge?

The Witness: No.

Q. But the roof did come over and cover the ledge?

The Court: Away up on top of the building.

Mr. Sardaro: Yes.

A. I believe the roof from the top of the building probably would come out to the edge of the ledge at least because the edge just seemed to be on the side of the building with oors opened up. It really wasn't a ledge in one sense of he word. Those buildings in Italy are constructed rather unny— 261

Q. Don't go into that.

262 The Court: Well, they are certainly funny if they do have railings with ledges like this, if people are made to go out of there. Didn't you see any railing there?

The Witness: There was no foot railing that you walked up to.

Q. Were there any other people on that ledge? A. Yes, there were people all around there. I judge there were five or six people around in that room and out to the edge, and there was probably some on each side of me. I really didn't pay any attention because I was thinking about the scenery out across the bay. 263

Mr. Sardaro: That is all.
The Court: Is that all?

Recross Examination by Mr. Connor:

Q. Do I understand you to say now that there were some people standing to the right or to the left of you as you were standing on the edge? Is that your testimony? A. I don't know whether they were out to the ledge or whether they were casually drifting around the room.

264 Q. You weren't paying any attention? A. That is right. I do not know just where they were, that's all.

Mr. Connor: That is all.

(Witness excused.)

Mr. Sardaro: Libellant rests.
Mr. Connor: Respondent rests.

Colloquy

The Court: Off the record. 265

(Discussion off the record.)

Mr. Connor: Those records are here, your Honor.

The Court: Do they show anything?

Mr. Connor: Yes. I would like to call your Honor's attention to one page, the history page. I will put the whole record in.

The Court: You had better offer the whole record.

Mr. Connor: I will put the whole record in evidence. 266

(Marked Respondents' Exhibit B.)

The Court: These are the records of what hospital?

Mr. Connor: Detroit Marine Hospital. I just want to show counsel the signature on this page to which I wish to call your Honor's attention and if it will be conceded that that is his signature I will read that page to your Honor.

The Court: Get your concession in first and then show it to me. 267

(Mr. Connor speaks with Mr. Sardaro off the record.)

The Court: I do not think you need to read it into the record.

Mr. Sardaro: I will concede it is his signature.

268 Mr. Connor: That page, if your Honor plea the purpose of the record, is entitled "Clinica ord" (handing to Court).

The Court: Do you have any comments up contents of this page?

Mr. Connor: Yes. It presents a totally di history than was testified to by the libelant.

The Court: Just as the log did.

Mr. Connor: Yes.

(Discussion re briefs.)

269 The Court: You have until four o'clock tom to submit any further memoranda.

270

Libelant's Exhibit 1

Form 1946-T
Federal Security Agency
Public Health Service
(June 1941)

ABSTRACT FROM CLINICAL RECORD

Name Walter K. Warren Occupation Merchant Seaman—Steward

Age 34 years, Last Vessel SS ANNA HOWARD SHAW

Furnished hospital care from February 27, 1945, to May 29, 1945

Furnished outpatient care from None

Diagnosis Fracture medial malleolus right leg with mal-union

CONDITION OF PATIENT UPON ADMISSION

On October 30, 1944 patient stated he fell from a sea wall in Italy, a distance of about thirty feet fracturing his right lower leg. A cast was applied and five and one half weeks later it was removed. After removal of cast patient noticed that his ankle became tender after walking and there was limitation of motility.

Physical examination revealed a laterally displaced fibula with swelling and limitation of motion of the right ankle. X-ray examination revealed mal-union. On March 2, 1945 an open reduction was performed.

Libelant's Exhibit 1

CONDITION OF PATIENT ON 5-29-45
(Date)

Improved. Advised to confine activities to light duty only for about one month after which it was anticipated that he would be fit for regular duty.

J. B. Ryon
Surgeon, United States Public Health Service, in Charge.
J. B. Ryon, Senior Surgeon USPHS
Clinical Director

[Impression,
Service
Seal]

U. S. Marine Hospital
(Station)

Detroit, 15, Michigan
(Address)

September 12, 1945
JBR:dcs

271

Libelant's Exhibit 1

Abstract of Detroit Hospital

~~(Omitted pursuant to stipulation)~~

272

273

Libelant's Exhibit 2

274 Claim filed Pursuant to Public Law 17
(Omnibus Bill H. R. 133)

In the Matter of the Claim of

WALTER K. WARREN

Certificate of Identification #482857; Residing at 325 Howe Street, Lansing, Michigan; born in the United States of America on August 2nd, 1910,

275 —against—

UNITED STATES OF AMERICA and AMERICAN
SOUTH AFRICAN LINES, INC.

SIRS:

PLEASE TAKE NOTICE that the above named claimant, by his attorney, SAUL SPERLING, pursuant to rules and regulations governing officers and crew members in such cases made and provided, does hereby claim and demand from
276 the United States of America, through the American South African Lines, Inc. the sum of Three thousand ($3,000) dollars and no/100 cents, as and for overtime, wages to October 30th, 1944 and thence to the end of the voyage, repatriation bonus, maintenance and cure, as and for damages sustained by ~~him~~ by reason of injuries which he sustained on October 30th, 1944 at about 4 P.M. while employed as messman aboard the S. S. "ANNA HOWARD SHAW".

Libelant's Exhibit 2

Claimant signed foreign Articles aboard the S. S. "ANNA HOWARD SHAW" at Philadelphia on or about June 1st, 1944. 277

Upon information and belief that said vessel was owned by the United States of America and was operated by the American South African Lines, Inc. as agent and for the account of the War Shipping Administration.

While said vessel was lying at Magnolia, Italy, on October 30th, 1944 claimant was granted shore leave and proceeded to visit a dance hall. That upon his arrival there he walked out on the balcony and was caused to fall therefrom when the railing thereof collapsed necessitating his immediate removal to the 118th Evacuation Hospital at Naples where he was confined until November 17th, 1944. 278
He was eventually returned to New York City for treatment at the United States Marine Hospital at Stapleton, Staten Island, where he was confined until December 21st, 1944.

On December 22nd, 1944 claimant made due demand of the American South African Lines, Inc. for payment of his wages which he had earned up to October 30th, 1944 plus his overtime, wages he would have earned had he been permitted to complete the voyage, his repatriation bonus and maintenance and cure. The said company has refused to entertain the same. 279

YOU WILL PLEASE TAKE FURTHER NOTICE that in the event this claim is declined, a Court action for the sum of Three thousand and no/100 ($3,000) dollars will be instituted herein.

Libelant's Exhibit 2

280 Dated: New York, N. Y., December 22nd, 1944.

Yours, etc.,

Walter K. Warren

Saul Sperling
Attorney for Claimant
Office & P. O. Address
61 Whitehall Street
Borough of Manhattan
City of New York

281 To:

Chief Adjuster
War Shipping Administration

American South African Lines, Inc.
26 Beaver Street
New York, N. Y.

282

Libelant's Exhibit 3

Form 1971M
Federal Security Agency
U. S. Public Health Service
(September 1939)

CERTIFICATE OF HOSPITAL AND OUTPATIENT TREATMENT

U. S. Marine Hospital Staten Island, N. Y.

Date Jan. 20, 1945.

1. Name of patient Walker K. Warren, Messman, SS Anna H. Shaw.

2. Brief abstract of patient's statement as to how and when disability was incurred On Oct. 30, 1944, at Naples, Italy, he sustained a fracture of the distal end of the right tibia and fibula when he fell about 50 feet, landing a pile of debris. His foot was caught and twisted between two large stones. He leaned against a guard rail, which broke, allowing him to fall to the debris below.

3. Diagnosis Osteomyelitis, old, of the shaft of the tibia, draining

4. Complications and operations Application of walking caliper to leg.

5. Date of admission to hospital Dec. 8, 1944

6. Date of discharge from hospital Dec. 21, 1944.

7. Date of admission to outpatient department ....

Libelant's Exhibit 3

8. Date of discharge from outpatient department ......

9. Condition on discharge Improved.

10. Number of days completely disabled Hospital period and for 6 weeks thereafter, following which he is to apply for outpatient treatment.

11. Number of days partially disabled ....

12. Prognosis ....

Vernam T. Davis
Vernam T. Davis, Surgeon, USPHS
Clinical Director
(Title)

By direction of the Medical Officer in Charge.

[Seal]

N. B.—This certificate is furnished to the patient to enable him to collect insurance benefits that may be due him and is to take the place of the certificate required by the insurance companies from private physicians who attend persons insured. It is compiled from the official records of the hospital and is signed by a medical officer of the United States Government over his official title.

Libelant's Exhibit 3

Clinical Record of Staten Island Hospital 283

Respondents' Exhibit A

Hospital Record— U. S. Memorial Hospital at Stapelton

Respondents' Exhibit A1

Statement Part of Exhibit A 284

Respondents' Exhibit B

Record of Detroit Memorial Hospital

285

286 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

APPEARANCES:

SAUL SPERLING, ESQ.
287 Proctor for Libellant
(Xavier N. Sardaro, Advocate)

JOHN F. X. MCGOHEY, ESQ.
United States Attorney
Proctor for Respondent
United States of America
(By Messrs. Kirlin, Campbell, Hickox & Keating, Advocates for said respondent United States of America)

288 MESSRS. KIRLIN, CAMPBELL, HICKOX & KEATING
Proctors for Respondent
American South African Line, Inc.
(Water X. Connor, Advocate)

Medina, *D. J.*: 289

Libellant, a merchant seaman, was injured while a member of the crew of the S. S. "Anna Howard Shaw," although not aboard [illegible] vessel at the time. In this proceeding in personam he claims maintenance and cure from the United States, the owner of the vessel, and the American South African Line, Inc., which was acting under the customary form of general agency agreement.

§2 of the Suits in Admiralty Act, 46 U. S. C. A. §742 provides:

> "In cases where if such vessel were privately owned 290
> or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their 291
> principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *."

At the time of the filing of the libel, the vessel was not within the waters of the United States or any of its territories. At all times libellant was a resident of Lansing, Michigan. It was stipulated that during the pendency of

this proceeding the vessel was for a time within the
292 territorial waters of the United States and within the Southern
District of New York. The respondent United States
pleaded both lack of jurisdiction and improper venue.

It may be that the language of the statute can be so
construed as to require a holding that the Court was without
jurisdiction. *Blamberg Brothers* v. *United States*, 260
U. S. 452 (1923); *Carroll* v. *United States*, 133 F. 2d 690
(C. C. A. 2 1943); *Abbott* v. *United States*, 61 F. Supp. 989
(S. D. N. Y. 1945); *Untersinger* v. *United States*, 1947
A. M. C. 1348 (S. D. N. Y.); *Barnes* v. *United States*, 67 F.
Supp. 571 (S. D. N. Y. 1946); *Sawyer* v. *United States*, 66
293 F. Supp. 271 (S. D. N. Y. 1946). On the other hand, the
basic purposes of the Suits in Admiralty Act and the similarity
of the language of §2 to the pattern of other provisions
of law pertaining to venue would seem to indicate
a lack of intention on the part of the Congress to make
the presence of the vessel in the waters of the United
States at the time of the filing of the libel an indispensable
prerequisite to jurisdiction. Nor does it seem possible to
reconcile a holding of lack of jurisdiction with judicial
determinations that the Court might proceed to decree
where the vessel has been torpedoed or where, for other
294 good and sufficient reasons, the presence of the vessel could
not be had or the point had been waived. *Eastern Transportation
Co.* v. *United States*, 272 U. S. 675 (1927); *Kunglig
Jarnvagsstyrelsen* v. *United States*, 19 F. 2d 761 (C. C.
A. 2 1927); *McGhee* v. *United States*, 62 F. Supp. 224 (S. D.
N. Y. 1945), *rev'd on other grounds*, 154 F. 2d 101 (C. C. A.
2 1946); *Hong* v. *United States*, 59 F. Supp. 794 (S. D. N. Y.
1944). No stipulation or act of parties or adventitious circumstance
arising out of war conditions could suffice to

confer upon the Court a jurisdiction over subject matter which otherwise would not exist. But this is by the way. 295

It is at least clear that the objection to venue is well taken; and the libel against the United States must accordingly be dismissed. *Abbott* v. *United States,* 61 F. Supp. 989 (S. D. N. Y. 1945); *Radinciuc* v. *United States,* 1947 A. M. C. 951 (E. D. Pa. 1947). Apparently libellant does not contend otherwise; and no application has been made to transfer the cause to any other district.

Respondent American South African Line, Inc. may still be liable, despite the dismissal of the libel as against the United States. *Carroll* v. *United States,* 133 F. 2d 690 (C. C. A. 2 1943). But it asserts that it is not liable for 296 maintenance and cure because the relationship of employer and employee did not exist between it and libellant.

American South African Line, Inc. was the general agent, having certain powers over and duties toward the S. S. "Anna Howard Shaw," appointed under a General Agent Service Agreement with the War Shipping Administration, similar to that cited and interpreted in *Hust* v. *Moore-McCormack Lines, Inc.,* 328 U. S. 707 (1946). Under the terms of that agreement, the general agent procures members of the crew, and makes them available to the ship's master, and in this case American South African Line, Inc. 297 was responsible for the hiring of libellant. The *Hust* case held that, for purposes of suit under the Jones Act, 46 U. S. C. A. §688, the general agent was the employer of a seaman injured aboard ship. In spite of the assertion by the Department of Justice in a letter, a copy of which was submitted to the Court, that the general agent "is a mere ship's husband looking after the accounting and certain other shoreside operations of the vessel," no argument is any longer possible, after the *Hust* case, that the general 298 agent is not, at least for some purposes, an "employer."

The question is whether the general agent is an employer for the purposes of liability for maintenance and cure. The reasoning of the *Hust* case would seem persuasive that it is. Respondent, however, attempts to distinguish that case because it was a suit for indemnity under the Jones Act, whereas this is not. True, respondent does not deny that a general agent may be liable both for indemnity under the Jones Act and for maintenance and cure, *Lewis* v. *United States Navigation Co.*, 57 F. Supp. 652 (S. D. N. Y. 1944), but it asserts that a suit for maintenance and cure against 299 a general agent cannot be maintained independently of a suit under the Jones Act.

I cannot make this distinction. If a general agent is an employer for the purposes of liability in tort under the Jones Act, it does not seem far-fetched to consider him an employer for the purposes of liability for maintenance and cure, that pervasive incident of the maritime contract, *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371 (1932), antedating the Jones Act by hundreds of years. *The Osceola*, 189 U. S. 158, 169-175 (1903). It would be incongruous to say that the Jones Act has by implication so weakened 300 it as to make it incapable of independent suit. 1 Benedict, Admiralty 258 (6th ed. 1940). There are authorities for this view, both in the Federal, *Broadbent* v. *United States*, 1947 A. M. C. 749 (E. D. Pa. 1947), and State courts. *Moss* v. *Alaska Packers Association*, 70 Cal. App. 2d 857, 160 P. 2d 224 (1945); *Martinez* v. *Marine Transport Line*, 1947 A. M. C. 529 (N. Y. City Municipal Court 1947).

Nor does *Caldarola* v. *Eckert*, 332 U. S. 155 (1947), require a different conclusion. There a stevedore was injured while working aboard a vessel with respect to which an agent was functioning under the usual General Agent Service Agreement. The general agent had nothing to do with his being hired, as he was the employee of a stevedoring concern under an independent contract with the government. The Supreme Court held that this agreement did not impose upon the agent "duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States." (332 U. S. at 159). Libellant here is not a business invitee, a third person, but a seaman procured by the general agent under the Service Agreement. He is more like Hust than Caldarola. It would not impose an unusual burden upon general agents to require them to make payments for maintenance and cure, for it has apparently been the practise for them to do so. See Legal Bulletin No. 53, War Shipping Administration, February 28, 1945. I find that American South African Line, Inc. is the libellant's employer for the purposes of a claim for maintenance and cure. Now to the merits. 301 302

Libellant was a messman aboard the S. S. "Anna Howard Shaw." On October 30, 1944, while the vessel was in the Bay of Naples, Italy, libellant left on shore leave. In company with the ship's carpenter and another messman, he went sightseeing. They came to the waterfront town of Bagnoli (referred to by libellant as Magnolia). The group stopped at various stores and at one such place they bought a small bottle of wine which they divided among them. About three miles down the shore from where they had landed from a motor lifeboat, they stopped at a dance hall and stayed an hour and a half or so. Libellant says he was dancing most of the time, and drank only one additional glass of wine. 303

After a time libellant entered another room and
304 approached a large window overlooking the sea, and he says the sight of the waves breaking upon the rocks some thirty-five feet below intrigued him. The french doors of this window extended to the level of the floor and he observed a sort of wholly unprotected ledge or balcony, which extended out from the building some two and a half or three feet. There was no railing of any sort and the slightest misstep or unsteadiness was almost sure to precipitate libellant. In any event, it was a perilous undertaking to go out upon this balcony and one even more perilous to lean over the edge to get a better view of the rocks and
305 waves immediately below. But this is what libellant did. When he came to a position where the toes of his shoes were six inches from the edge, he leaned over, at the same time taking hold of a rod about one-half inch in circumference, which was apparently affixed to the building to his right. He merely took a casual glance at this rod and makes no claim to have done more. It looked like a "lightning arrester or something of that type." Whether the fastenings such as they were had been weakened by bombs and shell fire, which had otherwise marked the buildings in the vicinity to some extent, does not appear. Nor
306 does the testimony disclose the purpose which this rod served. As he grasped it, and leaned over the edge, the rod came off and libellant lost his balance and fell. A similar ledge or balcony on one of the windows below broke his fall or he would have sustained injuries far more serious than a broken leg. This fall and its consequences are the basis for his suit for maintenance and cure.

A seaman, injured in the service of his ship, is entitled to maintenance at its expense. I Benedict, Admiralty §83

(6th ed. 1940). "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive" him of maintenance, the "traditional instances" being "venereal disease and injuries received as a result of intoxication." Rutledge, *J.*, in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 731 (1943). "Gross" negligence also deprives him of maintenance, *Reed* v. *Canfield*, 20 Fed. Cas. 426, No. 11,641 (C. C. D. Mass. 1832); *Jackson* v. *Pittsburgh S. S. Co.*, 131 F. 2d 668 (C. C. A. 6 1942). I shall first consider whether libellant was in the service of the ship when he was injured, then whether he was drunk, and whether he was "grossly" negligent. 307

When libellant was injured, he was over three miles from the ship, was not doing any work for the ship, but was where he was for his own pleasure. He claims he was "in the service of the ship," within the meaning the *Aguilar* case gave to that term. 308

That decision allowed maintenance and cure to seamen who were injured some distance, but no more than half a mile, from their ships, one while going on, and the other returning from, shore leave. In delivering the opinion of the Court, Justice Rutledge considered at length the policy bases for maintenance and cure and the necessity of extending its protection to sailors ashore. "Relaxation beyond the confines of the ship is necessary if the work is to go on. * * * shore leave is an elemental necessity in the sailing of ships * * * not merely a personal diversion. * * * it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment." 318 U. S. at 734. The 309 language of the opinion would justify a holding here that 310 libellant was in the service of his ship. Indeed, it has been suggested that the rationale of the *Aguilar* case "would seem to cover all injuries incurred without misconduct while on shore leave." Note, The Supreme Court of the United States during the October Term, 1942: I, 43 Columbia Law Review 837, 864, n. 162 (1943).

The respondent, though, points out that all the *Aguilar* case decided was that seamen injured while on their way to or from shore leave are entitled to maintenance; that only in dictum did Justice Rutledge extend that liability beyond the facts before the court. It insists that it would 311 be improper to subject the shipowner to liability for any any every injury his seamen received on shore leave, except those occasioned by their serious fault. Every drunken brawl in every waterfront dive would put the shipowner to expense as long as the injured seaman maintained he was an innocent bystander and the shipowner could not prove the contrary. The shipowner would in effect become an insurer of the safety of his men, on and off the ship, subject to his chance of establishing misconduct.

If the language of the Supreme Court is to be taken as anything more than sociological disquisition, courts must 312 regard it as pointing the way to a freer allowance of maintenance, even in situations less appealing than those then before the Court. It would be futile for courts to undertake to say how necessary shore leave was under the circumstances of a particular case; and the reasoning of the Supreme Court must be disregarded if it is to be held that maintenance must be granted to a seaman about to go on leave, but withheld from one who is actually enjoying that recreation which is said to be the "ship's business," 318 U. S. at 734, as well as his.

Courts have on the whole given the *Aguilar* case a liberal nterpretation. In *Muise* v. *Abbott*, 60 F. Supp. 561 (D. 313 Mass. 1945), the libellant, returning from shore leave, fell nto a pit an unspecified distance from his ship. Maintenance was allowed. In *Nowery* v. *Smith*, 69 F. Supp. 755 E. D. Pa. 1946), *aff'd*, 1947 A. M. C. 756 (C. C. A. 3 1947), he libellant while in a barroom on leave was injured by another member of the crew. Allowing maintenance, the Court said, 69 F. Supp. at 757, "* * * logic compels the onclusion that the seaman should also be considered on the shipowner's business' while he is actually enjoying his hore leave." In *Moss* v. *Alaska Packers Ass'n.*, 70 Cal. App. 2d 857, 160 P. 2d 224 (1945), the plaintiff, on shore 314 eave in Tasmania, was hit over the head in a barroom. Maintenance was allowed. In *Stanley* v. *Weyerhaeuser S. S. Co.*, 1947 A. M. C. 411 (Super. Ct. San Francisco 1947), he plaintiff had been injured seventeen miles from his hip while on leave. The Court set aside a release he had xecuted to the shipowner, because the latter's representaive had not explained to him his rights under the Jones Act and the *Aguilar* case.

This liberal interpretation seems to prevail in the Second Circuit. In *Kyriakos* v. *Goulandris*, 151 F. 2d 132 (C. C. A. 2 1945), a crew member assaulted the libellant on leave 315 ear the ship as a result of a shipboard disagreement. The Court held maintenance might be awarded, the *Aguilar* case being an alternative ground for its holding. In a ater stage of that case, *Kyriakos* v. *Polemis*, 63 F. Supp. 19 (S. D. N. Y. 1945), Judge Bondy allowed maintenance, citing the *Aguilar* case. In *Dasher* v. *United States*, 59 F. Supp. 742 (S. D. N. Y. 1945), the libellant had been injured on shore leave in a Mediterranean port. Judge Goddard

316 allowed maintenance. Judge Leibell cited the *Aguilar* case and *Kyriakos* v. *Goulandris,* in allowing maintenance in *Sullivan* v. *United States,* 1947 A. M. C. 426 (S. D. N. Y. 1947), where the libellant had been set upon and robbed returning from shore leave.

A few cases, however, interpret the *Aguilar* case more strictly. In *Siclana* v. *United States,* 56 F. Supp. 442 (S. D. N. Y. 1944), the libellant, returning from shore leave, had been attacked an unspecified distance from his ship. Judge Hulbert sustained exceptions to the libel, id. at 443: "* * * the locality of the attack is not identified. Its proximity
317 to the place of employment (the ship) is not disclosed and it may have been so far remote that his employer may not have been under any duty of responsibility whatever." In *Smith* v. *United States,* 1947 A. M. C. 481 (E. D. Va. 1946), the libellant on shore leave turned his ankle in the driveway of a friend's house over seven miles distant from the ship. The Court, limiting the *Aguilar* case to its facts, held maintenance could not be allowed to a libellant injured in familiar surroundings. The same rationale underlay *Taylor* v. *United Fruit Co.,* 1947 A. M. C. 1297 (N. Y. Sup. Ct. App. Term 1947), where the plaintiff, at home on leave, stepped out to buy a newspaper and was injured on
318 the way back. The Court reversed a judgment for maintenance.

If there is a place where the shipowner's liability for maintenance thins out and disappears, I do not think surveyors' instruments may be used to find it. The policy considerations protecting seamen in transit to and from shore leave do not automatically vanish throughout the course of the leave itself. Moreover, the reasoning which underlies the conclusions arrived at in the *Aguilar* case

ems a safer guide than the exact circumstances of the
rticular case or chance phrases to be found in the text 319
the opinion. If the logical results of this reasoning are
be whittled down by fine distinctions, it seems that the
nes of demarcation should be drawn by the Supreme
ourt and not at nisi prius. *Delaware & Hudson Co.* v.
ommissioner of Internal Revenue, 65 F. 2d 292, 293 (C. C.
2 1933); *Farmers' Loan & Trust Co.* v. *United States,*
F. 2d 688, 689 (S. D. N. Y. 1925); *Cameron* v. *United*
ates, 250 Fed. 943, 947 (C. C. A. 9 1918); *Bakewell* v.
nited States, 110 F. 2d 564 (C .C. A. 8 1940); *Tucker* v.
orton, 49 F. Supp. 483, 484 (E. D. Pa. 1943). In any
ent, by any test reasonably consistent with the opinion 320
Justice Rutledge the place where Warren fell was not
o far from the ship and the surroundings were far from
miliar. I hold the libellant was injured in the service of
s ship.

The evidence as to libellant's intoxication is conflicting.
e says he had had only about a third of a small bottle of
ne and one glass more before he was injured. The record
the hospital to which he was taken after his injury, how-
er, contains the entry "acute alcoholism." Libellant says
may have presented a stupefied appearance when he
ached the hospital, because he had previously been given 321
orphine; therefore the hospital doctors may have thought
m drunk. The ship's log is interesting but inconclusive.
reads:

> "On October 30, 1944, at Naples, Italy, Walter K. Warren, messman, on this date injured himself in fall; sent to 118th Station Hospital, Naples, Italy, for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, car-

322 penter, and James M. Barr, messman, stated Warren was sober. Injury apparently accidental."

I am inclined to think libellant was less sober than he says he was, but I find he was not so under the influence of liquor as to be barred from recovery.

Respondent asserts libellant's own "gross" negligence was the cause of his injury. Heretofore the question of "gross" negligence appears to have shaded somewhat into the question whether the injured seaman was in the service of the ship. *Barlow* v. *Pan Atlantic S. S. Corp.*, 101 F. 2d 697, 698, 699 (C. C. A. 2 1939); *Jackson* v. *Pitts-*
323 *burgh S. S. Co.*, 131 F. 2d 668 (C. C. A. 6 1942); *The Ben Flint*, 3 Fed. Cas. No. 1,299, at 185 (D. Wisc. 1867); *The Quaker City*, 1 F. Supp. 840, 841, 842 (E. D. Pa. 1931). But since the *Aguilar* case tends to take the subleties out of the question of injury in the ship's service, the question of "gross" negligence will probably bulk larger as an independent defense to maintenance actions from now on. While it may be, as contended by respondents, that conduct which would be adjudged "grossly" negligent away from the ship might be viewed differently when on the ship itself, it is likely that the difference is more apparent than real.

324 Attempts to classify the various graduations of negligence have largely proved elusive. Generalities are likely to lead to error in particular situations. If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another. This being true it is hard to find any definition of "gross" negligence which will fit into the pattern of the maintenance cases other than that of a reckless disregard of safety. Restatement, Torts §§500, 502 (1934).

That libellant here was negligent seems sufficiently plain. Did he act in reckless disregard of safety? Perhaps it 325 could be said that he did but for the one precaution of grasping the rod which he thought was securely fastened to the building. Accordingly, as he exercised some care, it can hardly be found that his act was "grossly" negligent in the sense of being reckless. Wilfulness in any real sense is contradicted by all the attendant circumstances as well as by libellant's testimony. The claim for maintenance is allowed in the amount of Six Hundred Forty-four and 16/100ths Dollars ($644.16) and a decree will be entered in favor of libellant for that sum together with costs against respondent American South African Line, 326 Inc. As to respondent United States the libel is dismissed.

Submit findings.

Harold R. Medina
U. S. D. J.

Dated: December 8th, 1947.

327

Notice of Motion

UNITED STATES DISTRICT COURT

328 SOUTHERN DISTRICT OF NEW YORK

A 135-171

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of
329 Walter X. Connor, sworn to the 15th day of December
1947, and on all the pleadings and proceedings had herein, the undersigned will move this Court at a stated term for the hearing of motions at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York on the 23rd day of December 1947, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order granting a rehearing of the above entitled case, and on rehearing, for an order dismissing the libel against respondent, American South African Line, Inc., and in the alternative reducing the amount awarded libelant, and for such other, further and
330 different relief as to the Court may seem just and proper.

Dated, New York, December 15, 1947.

Yours, etc., 331

John F. X. McGohey,
United States Attorney,
Proctor for U. S. A.

Kirlin Campbell Hickox & Keating
of counsel to said respondent and
Proctors for respondent, American
South African Line, Inc.,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan, 332
City of New York 5.

o:

Saul Sperling, Esq.,
Proctor for Libelant,
61 Whitehall Street,
New York, N. Y.

333

Affidavit of Walter X. Connor

UNITED STATES DISTRICT COURT

334 SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WALTER X. CONNOR, being duly sworn, deposes and says:

335 I am an attorney at law, associated with the firm of Kirlin, Campbell, Hickox & Keating, of counsel to proctor for the respondent, United States of America and proctors for the respondent, American South African Line, Inc., and I am familiar with all the pleadings and proceedings heretofore had herein.

On or about December 8th after the trial of this case before Honorable Harold R. Medina on October 29th, 1947, Judge Medina handed down his decision awarding maintenance in the sum of $644.16 against the respondent, American South African Line. Shortly prior thereto, the Circuit Court of Appeals for the Second Circuit handed down
336 a decision in *Shilman* v. *United States of America and Grace Line, Inc.*, in which the Circuit Court of Appeals held that the general agent was not liable to seamen for wages or other contractual obligations. Moreover, it analyzed the decisions in *Hust* v. *Moore-McCormack and Calderola* v. *Thor Eckert*, and concluded that, at least, in cases not involving the Jones Act, the general agent was not suable as employer.

Furthermore, the decision awarded an amount of maintenance which I believe is in excess of what Warren should receive. It is not clear from the opinion, how the sum awarded was reached. It was not anticipated at the termination of the trial that there would be any award in any amount to libelant. The exact amount due was therefore not argued by respondents. 337

Wherefore, I respectfully pray that a rehearing be granted.

Walter X. Connor

(Sworn to December 15, 1947.) 338

339

Memorandum on Rehearing

340 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

APPEARANCES:

341 SAUL SPERLING, ESQ.
Proctor for Libellant
(Xavier N. Sardaro, Advocate)

JOHN F. X. MCGOHEY, ESQ.
United States Attorney
Proctor for Respondent
United States of America
(By Messrs. Kirlin, Campbell,
Hickox & Keating, Advocates
for said respondent United
States of America)

342

MESSRS. KIRLIN, CAMPBELL, HICKOX & KEATING
Proctors for Respondent
American South African Line, Inc.
(Walter X. Connor, Advocate)

Memorandum on Rehearing

Medina, *D. J.*

343

In *Shilman* v. *United States of America War Shipping Administration and Grace Line, Inc.*, decided December 4, 1947, the Circuit Court of Appeals did not decide that a seaman may not recover maintenance and cure against a steamship company acting under a General Agency Agreement. The contention that the Circuit Court of Appeals would so hold, should such a case come before it, is based upon the statement at the end of the opinion that neither in the *Hust* case nor in the *Caldarola* case was it held that the agent was an employer to such an extent as to give rise to liability for wages "or other contractual obligations." The subject is a prickly one. The right to maintenance and cure traces its origin to a time when such things as "contractual obligations" in the modern sense of the term could scarcely be said to exist. This right is inherent in the status of the seaman. It is by no means clear that a right to maintenance and cure may not arise even prior to the signing of Shipping Articles, Comment, The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale Law Journal 243, 248 n. 19 (1947), citing *Martinez* v. *Marine Transport Line,* 1947 A. M. C. 529 (N. Y. City Mun. Ct.), rev'd on other grounds, 119 N. Y. L. J. 787 (Sup. Ct. App. Term Mar. 2, 1948); and a scrutiny of the long and interesting history of this curious remedy of the maritime law would seem to lead to the conclusion that it partakes as much of the character of tort as contract and perhaps hangs suspended as it were between the two. In any event, my holding that American South African Line, Inc. is libellant's employer for the purposes of a claim for maintenance and cure stems from

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346 the *Hust* case. With each new reading of the opinion of the Court I am the more convinced that the reasoning behind that decision applies just as forcibly to maintenance and cure as to the remedy provided by the Jones Act. While the *Hust* case stands, it seems to me I have no alternative than to stick to my guns.

Respondent American South African Line, Inc. now urges for the first time that the Clarification Act is a bar to libellant's recovery. But by the weight of authority and the weight of reason too the Clarification Act will not bear the construction which respondent would give it with respect to rights arising after the date it took effect. *Bennett* v. *Wilmore S. S. Corp.*, 69 F. Supp. 427 (S. D. Tex. 1946); *Moss* v. *Alaska Packers Association*, 70 Cal. App. 2d 857, 160 P. 2d 224, 1945 A. M. C. 493 (1945); *Gay* v. *Pope & Talbot*, 47 N. Y. S. 2d 16, 1944 A. M. C. 855 (Sup. Ct. 1944); *Cohen* v. *American Petroleum Transport Corp.*, 1947 A. M. C. 336 (N. Y. City Court 1947); *Fink* v. *Shepard Steamship Co.*, 1946 A. M. C. 1333 (Or. Cir. Ct. 1946). Contra: *Gaynor* v. *Agwilines, Inc.*, 1948 A. M. C. 81 (E. D. Pa. 1947); cf. *United States* v. *Lubinski*, 153 F. 2d 1013 (C. C. A. 9th 1946). 347

Motion denied.

Submit findings. 348

Harold R. Medina
U. S. D. J.

March 4, 1948.

Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT 349

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

FINDINGS OF FACT

1. Libelant was employed on board the S. S. "Anna Howard Shaw" as a messman. 350

2. The S. S. "Anna Howard Shaw" was owned by the United States of America.

3. The American South African Line, Inc., was acting as general agent for the United States of America with regard to the S. S. "Anna Howard Shaw" under customary form of general agency agreement, 46 Code Fed. Regs. §306.44 (Cum. Supp. 1944).

4. At the time of the filing of the libel, the S. S. "Anna Howard Shaw" was not within the waters of the United States nor any of its territorial waters. 351

5. During the pendency of this proceeding the S. S. "Anna Howard Shaw" was for a time within the territorial waters of the United States and within the Southern District of New York.

6. At all times libellant was a resident of Lansing, Michigan.

352 7. When libellant first reported to work aboard the S. S. "Anna Howard Shaw," he knew he was going to work for a company by the name of American South African Line, Inc.

8. On October 30th, 1944 while the S. S. "Anna Howard Shaw" was in the Bay of Naples, Italy, libellant left on shore leave in the company of the ship's carpenter and another messman.

9. Libellant and his companions came to the waterfront town of Bagnoli whose buildings showed evidences of having been in an area of active war. 353

10. About three (3) miles down the shore from the place where they had landed in the motorboat from the S. S. "Anna Howard Snaw," they entered a dance hall and stayed for an hour, and a half or so.

11. After dancing with some native women whom libellant met in the dance hall, he entered an adjoining room in the dance hall which overlooked the sea. There were French doors in this room which reached to the level of the floor outside of which was a ledge approximately 2 1/2 to 3 feet in width, not protected by any railing. 354

12. Libellant went out on this ledge to view the waves and rocks below. The ledge was not protected by any railing, and there was a 35-foot drop from it to the rocks below.

13. When libellant came to a position where the toes of his shoes were approximately 6 inches from the edge, he

leaned over so that his head protruded slightly beyond the edge of the ledge and at the same time he took hold of a 355 metal rod which was about 1 1/2 inches in circumference and which was apparently affixed to the building to his right.

14. Before taking hold of this rod he glanced at it and concluded that it was a lightening arrester or something like that.

15. As libellant was in the position described in Finding 13, the rod mentioned in Findings 13 and 14 broke loose or came off and libellant lost his balance and fell 356 below.

16. At the time libellant fell he was not performing any work for the vessel and was in fact more than three miles from it on authorized shore leave and actually enjoying his own pleasure.

17. I find that libellant was not so under the influence of alcohol as to be barred from recovery of maintenance.

18. I find that libellant did not act in reckless disregard of his own safety nor was he grossly negligent. 357

CONCLUSIONS OF LAW

1. The libellant having failed to bring his action against respondent, United States of America, in the proper district, it is dismissed for improper venue as against respondent, United States of America.

358 2. Libellant sustained injuries while in the service of his ship.

3. Respondent, American South African Line, Inc., was libellant's employer for the purposes of a claim for maintenance and cure.

4. Libellant was neither so negligent nor so intoxicated as to be barred from recovering an allowance for maintenance and cure.

5. Libellant is entitled to a decree against respondent, 359 American South African Line, Inc., in the sum of Six Hundred Forty-Four and 16/100 Dollars ($644.16) on account of maintenance and cure expenses and wages to the end of the voyage.

Dated: New York, N. Y. April 29, 1948.

Harold R. Medina,
United States District Judge.

360

Final Decree

At a stated term of the United States District Court of and for the Southern District of New York, held at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 27th day of April, 1948. 361

Present:

Hon. Harold R. Medina,
District Judge.

Ad. 135-171 362

[SAME TITLE]

This cause having come on to be heard in its regular order on October 29, 1947, upon the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and the Court after due deliberation having rendered its opinion in writing and directing a decree granting libellant his damages of and from the respondent, American South African Line, Inc., in the 363 sum of $644.16, together with costs against the respondent, American South African Line, Inc. and dismissing the libel as to the respondent, United States of America, as owner of the steamship "ANNA HOWARD SHAW", and the respondents having moved this court for an order granting a re-hearing of the above-entitled case, and the said motion having been denied, the court after due deliberation having filed its opinions in writing and its

findings of fact and conclusions of law, and libellant's costs
364 having been duly taxed at the sum of $36.00,

Now, on motion of Saul Sperling, proctor for the libellant, it is

Ordered, adjudged and decreed that the libellant recover of and from the respondent, American South African Line, Inc., which name has since changed to Farrell Lines, Inc., the sum of $644.16, together with the libellant's costs taxed in the sum of $36.00 and amounting in all to the sum of $680.16, with interest thereon until paid; and it is
365 further

Ordered, adjudged and decreed that the libel herein against the respondent United States of America, as owner of the steamship "ANNA HOWARD SHAW" be and the same hereby is dismissed, and it is further

Ordered, that unless this decree be satisfied or an appeal taken therefrom within ten (10) days after service of a copy of this decree upon the respondent, American South African Line, Inc., or its proctors, the libellant have execution against the respondent, American South African
366 Line, Inc., which name has since changed to Farrell Lines, Inc., and its stipulators for costs, their goods, chattels and lands forthwith to satisfy this decree.

Harold R. Medina,
U. S. D. J.

Affidavit of Costs and Disbursements

UNITED STATES DISTRICT COURT 367

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

COSTS

Proctor's docket fee	$20.00	368

DISBURSEMENTS

Clerk's fees	15.00
Copy of opinion on re-argument	1.00
Costs Taxed 5/3/48	$36.00

Taxed with approval of both sides.

WILLIAM V. CONNELL, 369
Clerk.

Affidavit of Costs and Disbursements

STATE OF NEW YORK,
370 CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

Harold J. Olliffe, being duly sworn deposes and says that he is associated with Saul Sperling, the attorney for the plaintiff in the above entitled action. That the disbursements above specified have been made in the said action or will necessarily be made or incurred therein; that a decision has been rendered after trial in favor of the plaintiff.

371 HAROLD J. OLLIFFE

(Sworn to April 26, 1948.)

372

Notice of Appeal and Order Allowing Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 373

WALTER K. WARREN,

Libelant,

—against—

UNITED STATES OF AMERICA and
AMERICAN SOUTH AFRICAN LINE, INC.,

Respondents.

374

SIR:

PLEASE TAKE NOTICE that the American South African Line, Inc., now known as Farrell Lines, Inc., respondent, hereby appeals to the United States Court of Appeals for the Second Circuit from the final decree entered herein on the 3rd day of May, 1948, which ordered, adjudged and decreed that the libelant recover of the respondent, American South African Line, Inc., the sum of $644.16, together with costs.

Dated: New York, N. Y. 375
May 3rd, 1948.

Yours, etc.,

376

KIRLIN CAMPBELL HICKOX & KEATIN
Proctors for Respondent
American South African Line, I
and Counsel to

JOHN F. X. MCGOHEY,
United States Attorney,
120 Broadway,
New York 5, New York.

377 To:

SAUL SPERLING, ESQ.,
61 Whitehall Street,
New York 4, New York.

The foregoing appeal is hereby allowed.

HULBERT
U. S. D.

Dated, New York, May 3rd, 1948.

378

Assignments of Error of Appellant

UNITED STATES DISTRICT COURT

Southern District of New York

[SAME TITLE]

Respondent, American South African Line, Inc., assigns error to the final decision and decree of the district court in the following respects:

1. In that the court awarded libelant maintenance and cure damages against respondent, American South African Line, Inc., although the court found:

(a) That at the time the libelant sustained his injuries he was on shore leave and enjoying his own pleasure;

(b) That at the time the libelant sustained his injuries he was three miles from the place where he had landed in a motorboat from his ship.

(c) That at the time the libelant sustained his injuries he was in a dance hall;

(d) That his injuries were sustained when he fell from a ledge, unprotected by any railing, from which there was a 35 foot drop to the rocks below;

(e) That the ledge was but 2 1/2 to 3 feet wide outside of the building;

382 (f) That at the time he fell the toes of libelant's shoes were approximately 6 inches from the edge and that he leaned over so that his head protruded slightly beyond the edge of the ledge.

(g) That he did nothing to protect himself save to take hold of what he then concluded after only a glance was a lightening arrester or something like that.

(h) That the libelant was less than sober at the time of his injury.

383 2. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was on shore leave and enjoying his own pleasure.

3. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was three miles from the place where he had landed in a motorboat from his ship.

384 4. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was in a dance hall.

5. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that libelant's injuries were sustained when he fell from a ledge, unprotected by any railing, from which there was a 35 foot drop to the rocks below.

6. In that the court found that the libelant at the time
he fell was in the service of the ship although the court 385
also found that the ledge from which libelant fell was but
2 1/2 to 3 feet wide outside of the building.

7. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time he fell the toes of libelant's shoes were approximately 6 inches from the edge and that ~~he leaned over so that his head~~ protruded slightly beyond the edge of the ledge.

8. In that the court found that the libelant at the time 386
he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he did nothing to protect himself save to take hold of what he then concluded after only a glance was a lightening arrester or something like that.

9. In that the court found that the libelant at the time he fell was in the service of the ship although the court also found that at the time the libelant sustained his injuries he was less than sober.

10. In that the court failed to find that at the time he fell 387
libelant was under the influence of alcohol.

11. In that although the court found that libelant had been indulging in alcohol to some extent the court nonetheless found that the acts of libelant did not constitute gross negligence or misconduct.

Assignments of Error of Appellant

12. In that although the Army Hospital records showed
388 that libelant was suffering from acute alcoholism at the time of his accident, the court nonetheless found that he was not so under the influence of alcohol as to be barred from recovery of maintenance.

13. In that the court failed to find that the libelant's injuries were due to his misconduct or gross negligence.

14. In that the court found that libelant did not act in reckless disregard of his own safety nor was he grossly negligent.

389

15. In that the court found that the libelant's injury was not brought about by willfulness on his part.

16. In that the court found that libelant's injury was not brought about by his gross negligence.

17. In that the court found that libelant could not have been grossly negligent unless there was also an element of willfulness "or something akin to it" in his conduct.

18. In that although the court found that the buildings in the town where the accident happened showed evidence
390 of having been in an area of active war, the court failed to find libelant guilty of negligence in attempting to support himself by a lightening arrester or something like that, the character of the fastenings of which he did not know.

19. In that although the court found it was a perilous undertaking for one to go out on a ledge from which the libelant fell and even more perilous to lean out on the

ledge to get a better view of the waves and rocks below, the
court nonetheless found that such acts of the libelant did 391
not constitute gross negligence or misconduct.

20. In that although the court found that respondent, American South African Line, Inc., was not acting otherwise than as general agent for the United States of America with regard to the Steamship ANNA HOWARD SHAW under the customary form of general agency agreement the court also found that the said respondent American South African Line, Inc., was libelant's employer and as such liable for maintenance and cure.

392 21. In that the court found that when libelant first reported for work aboard the ANNA HOWARD SHAW he knew he was going to work for a company by the name of American South African Line, Inc.

22. In that the court found that the libelant when he first reported for work was going to work for the American South African Line, Inc., and that the libelant so knew.

23. In that although the answer of respondent, American
South African Line, Inc., denied it was the employer of
libelant the court found that respondent American South 393
African Line Inc., was the employer of libelant without
proof thereof.

Kirlin Campbell Hickox & Keating,
Proctors for Respondent
American South African Line, Inc.,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan,
City of New York 5.

Cross Assignments of Error

394 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 135-171

[SAME TITLE]

1. The District Court erred in dismissing the libel herein against the respondent, United States of America.

395 2. The District Court erred in entering a decree in favor of the United States of America against libelant.

3. The District Court erred in finding the libelant failed to institute his action against the respondent, United States of America, in the proper district.

4. The district Court erred in holding that the objection of the respondent, United States of America, to the venue of the proceeding was well taken despite said respondent's general appearance and contestation of the merits of the action.

396 5. The District Court erred in failing to hold and find that Section 2 of the Suits in Admiralty Act (46 U. S. C. Sec. 742) was a venue provision rather than a jurisdictional provision applying to the subject matter.

6. The District Court erred in failing to interpret that the Suits in Admiralty Act (Title 46 U. S. C. 742) as the consent by the Government to be sued in actions such as

this arising out of the operation of a merchant vessel where a similar action could be maintained against a private owner or ship. 397

7. The District Court erred in dismissing the libel against respondent, United States of America, despite the fact that the vessel involved, the S. S. ANNA HOWARD SHAW docked at New York on June 4, 1945, less than two months after the filing of said respondent's answer, and again docked on February 3rd, 1946, during the pendency of the instant proceeding.

8. The District Court erred in holding as a conclusion of law that the suit against the respondent, United States of America, was not brought in the proper district. 398

Dated, New York, June 17th, 1948.

Saul Sperling,
Proctor for Libelant,
61 Whitehall Street,
New York 4, N. Y.

399

Stipulation as to Exhibits

400 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

It is hereby stipulated that the exhibits (other than libelant's exhibits 1, 2, and 3) need not be printed but may be handed to the court at the argument of the appeal.

401 SAUL SPERLING,
Proctor for Appellee.

KIRLIN CAMPBELL, HICKOX & KEATING,
Proctors for Appellant.

402

Stipulation as to Record

UNITED STATES DISTRICT COURT 403

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

404

Dated: June , 1948.

SAUL SPERLING,
Proctor for Appellee.

KIRLIN CAMPBELL HICKOX & KEATING,
Proctors for Appellant.

405

Clerk's Certificate

406 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

407 I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties. The last day to file this record is

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of June in the year of our Lord one thousand nine hundred and forty-eight and of the independence of the said United States the one hundred and seventy-second.

408

WILLIAM V. CONNELL,
Clerk.

(Seal)

[fol. 137] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1949

No. 45

(Argued December 9, 1949. Decided December 27, 1949)

Docket No. 21410

WALTER K. WARREN, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from the United States District Court for the Southern District of New York

Suit in admiralty for the recovery of maintenance wherein the libellant was awarded a decree against American South African Line, Inc., as general agent of a merchant vessel of [fol. 138] the United States, and the libel against the United States was dismissed. 75 F. Supp. 210, 76 F. Supp. 735. American South African Line, Inc., has appealed from the decree against it and libellant, by cross-assignments of error, has appealed from dismissal of his libel against the United States. Decree for libellant reversed and dismissal of the libel affirmed on the merits.

Kirlin, Campbell, Hickox and Keating, Proctors for Appellant and Counsel to John F. X. McGohey, United States Attorney; Walter X. Connor and Vernon Sims Jones, Advocates.

Saul Sperling, Proctor for Appellee; Lester Lyons, Advocate.

SWAN, Circuit Judge:

The libellant, a messman employed on a merchant vessel of the United States, sustained injuries during shore leave. The decree on appeal awarded him maintenance in the sum of $644.16 against the appellant, American South African

Line, Inc., which managed certain phases of the ship's business under the war-time standard form of General Agency Agreement. Subsequent to entry of the decree, it was authoritatively determined that such an agent is not liable for maintenance. *Fink* v. *Shepard S. S. Co.*, 337 U. S. 810, 815. Accordingly the parties have agreed that the decree against American South African Line, Inc., shall be reversed without costs.

The libel against the United States was dismissed for improper venue. The libellant was not a resident of the Southern District of New York and when the libel was filed the vessel on which he had been employed was not [fol. 139] within that district.[1] Section 2 of the Suits in Admiralty Act, 46 U. S. C. A. § 742, prescribes the venue for suits of this character.[2] *Hoiness* v. *United States*, 335 U. S. 297. Plainly venue was lacking when the libel was filed, and the answer of the United States pleaded this as a defense.[3] At the trial, however, it was stipulated that the vessel was within the Southern District of New York during the pendency of the action.[4] The libellant contends that this cured any defect of venue. We think he is right.

If a libel *in rem* is filed against a privately owned vessel not in the district, the vessel may be arrested when she comes within the district and the suit may thereafter proceed. See *F. E. Grauwiller Transp. Co.* v. *Exner Sand*

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[1] The libel alleged that the S. S. Anna Howard Shaw "is now, or during the pendency of this action will be in the Port of New York and within the territory and jurisdiction of the United States of America."

[2] Section 2 provides in part as follows:

> "* * * Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found."

[3] The answer also pleaded to the merits but this did not waive the objection to venue. *Untersinger* v. *United States*, 2 Cir., 172 F. 2d 298; *Orr* v. *United States*, 2 Cir., 174 F. 577.

[4] The libel was filed March 2, 1945. The trial was in October 1947. The vessel docked at New York on June 4, 1945 and again on February 3, 1946.

& Gravel Corp., 2 Cir., 162 F. 2d 90, 92; *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.*, 9 Cir., 94 F. 180, 185, reversed on other grounds, *Queen of the Pacific*, 180, U. S. 59. The Suits in Admiralty Act substitutes for seizure of the vessel the filing of a libel containing an election to proceed *in rem* and the service of copies of the libel on the United States Attorney and the Attorney General. Since a government-owned vessel cannot be arrested, the most that could be demanded of a libellant who had filed his libel *in rem* during the vessel's absence, would be some symbolic equiva- [fol. 140] lent of an arrest when she later came into the district. We can think of nothing he could do as such a symbolic equivalent except to serve again a copy of his libel; and that would be a pure formality having no useful purpose provided the original service gave notice that the suit was *in rem*, as it did in the case at bar.[5] In *Carroll* v. *United States*, 2 Cir., 133 F. 2d 690, 692, we suggested that it might be sufficient to sustain jurisdiction *in rem* that the ship was within the United States at the time of the trial "since the filing of a second libel would be a mere matter of form." That suggestion was again alluded to in *Schnell* v. *United States*, 2 Cir., 166 F. 2d 479, 482, and in *Grant* v. *U. S. War Shipping Administration*, 65 F. Supp. 507, 510 (D. C. Pa.). We now accept the suggestion and hold that the defect in venue which existed when the libel was filed was cured when the vessel came within the Southern District of New York. Whether for purposes of laches the suit should be deemed to have been begun when the libel was filed or only when the vessel came within the jurisdiction of the court is a question not now presented nor considered.[6]

On the merits the libellant is entitled to maintenance under the doctrine of *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, unless his injuries resulted from "some wilful misbehavior or deliberate act of indiscretion" of his own, p. 731. In the decisions there cited the phrase "gross negligence" is used to describe conduct which will preclude recovery of maintenance.[7] In the case at bar the libellant stood on the brink of a precipitous cliff and leaned forward over the edge in [fol. 141] order to get a better view of the rocks and waves thirty-five feet below. His right hand grasped a rod half an inch in diameter which he assumed from a casual glance to be fastened to the building in which he had been dancing and drinking wine. The rod came loose and he was precipitated over the edge of the cliff. The district judge found that he was not so under the influence of alcohol as to be barred from recovery of maintenance; and that he did not act in reckless disregard of his own safety nor was he grossly negligent.

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[5] Cf. *Schnell* v. *United States*, 2 Cir., 166 F. 2d 479, 482, where the libel, a copy of which was served, was *in personam*.

[6] See note 4, *supra*.

We accept the finding that libellant was not drunk. Whether he was "grossly negligent" poses a question which is always difficult to answer. See *Moisan* v. *Loftus*, 2 Cir., decided December 1, 1949. Before the Supreme Court's decision in the *Aguilar* case, *supra*, 318 U. S. 724, it was not necessary to assess a libellant's degree of care when his injury occurred during a period of relaxation afloat or ashore, for he was barred from recovery on the theory that he was not then in the service of his ship. See *Meyer* v. *Dollar S. S. Lines*, 9 Cir., 49 F. 2d 1002. And when his conduct was examined, the degree of his fault was sometimes assimilated, on a rather ambiguous theory of proximate cause, to the issue of whether he was in his ship's service. See *Jackson* v. *Pittsburgh S. S. Co.*, 6 Cir., 131 F. 2d 668. Accordingly, the pre-*Aguilar* cases are of little assistance in guiding us to a correct decision here.

Since *Aguilar*, a number of decisions have awarded maintenance and cure to seamen engaged in their own pursuits ashore under circumstances which did not compel assessment of what degree of negligence should be ascribed to their conduct.[8] The question was squarely presented, [fol. 142] however, in *Ellis* v. *American Hawaiian S. S. Co.*,

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[7] *Peterson* v. *The Chandos*, 4 F. 645, 651 (D. C. Ore.); *The J. F. Card*, 43 F. 92, 93 (D. C. N. Y.); *The Ben Flint*, 3 Fed. Cas. No. 1299 (D. C. Wis.). See also *Jackson* v. *Pittsburgh S S. Co.*, 6 Cir., 131 F. 2d 668, 670.

[8] *Kyriakos* v. *Goulandris*, 2 Cir., 151 F. 2d 132; *Nowery* v. *Smith*, 69 F. Supp. 755 (D. C. Pa.), aff'd, 3 Cir., 161 F. 2d 732; *Smith* v. *United States*, 4 Cir., 167 F. 2d 550; *Grovell* v. *Stockard S. S. Co.*, 78 F. Supp. 931 (D. C. Pa.).

9 Cir., 165 F. 2d 999. There, the libellant had gone ashore to a Service Club, where he had "a few beers." He then proceeded to dive into a swimming pool containing only four feet of water. Two dives were successful; on the third he struck his head against the pool's bottom. In holding his conduct not so negligent as to bar recovery of maintenance and cure, the court stressed that the danger was not great; on the contrary, Ellis had dived twice without harm before meeting with his accident.

In the case at bar, the risk of serious injury or even death if the seaman should fall over the cliff, was obvious; and the requisite degree of care correspondingly higher. In the face of evident danger, the care which Warren took was very slight—a mere casual glance at the rod which he thought to be a "lightning arrester or something of that type." We think that a man who acts as he did under circumstances of danger does not show even a minimal degree of regard for the consequences of his act. Unless his ship is to be an insurer of his safety, he cannot recover against her.

Dismissal of the libel against the United States is affirmed on the merits; the decree against the ship's agent is reversed without costs.

[fol. 143] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of December one thousand nine hundred and forty-nine.

Present: Hon. Learned Hand, Chief Judge; Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

WALTER K. WARREN, Libellant-Appellee,

vs.

UNITED STATES, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that that part of the decree dismissing the libel against the United States be and it hereby is affirmed on the merits; that part of the decree awarding maintenance against the ship's agent be and it hereby is reversed without costs in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk; by (S.) A. Daniel Fusaro, Deputy Clerk.

[fol. 144] [Endorsed:] United States Court of Appeals, Second Circuit. Walter K. Warren v. United States & American South African Line. (45). Judgment. United States Court of Appeals, Second Circuit. Filed December 27, 1949. Alexander M. Bell, Clerk.

[fol. 145] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket #21410. October Term 1949

WALTER K. WARREN, Libelant-Appellee,

against

UNITED STATES OF AMERICA, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

Petition for Re-Hearing

Saul Sperling, Proctor for Libelant-Appellee.
Lester Lyons, Advocate.

[fol. 146] To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The above named libellant respectfully presents this, his petition, for amendment of the opinion, and for rehearing of the above entitled cause, and in support thereof shows as follows:

1. This Court unduly restricted the policy and rule expounded in *Aguilar* v. *Standard Oil Co.* governing the right to maintenance and cure;
2. The facts show that even under the standard adopted by this Court libelant was not grossly negligent; and
3. Libelant is entitled to a recovery under the Shipowners' Liability Convention of 1936.

[fol. 147]

POINT I

This Court Unduly Restricted the Policy and Rule Expounded in Aguilar vs. Standard Oil Co. Governing the Right to Maintenance and Cure

In its opinion herein, this Court held that "gross negligence" would and should preclude a recovery for maintenance, apparently on the basis of *Aguilar* vs. *Standard Oil Co.*, 318 U. S. 724 and the cases there cited. We respectfully submit that those cases do not require or even authorize such holding and that in any event the concept of "gross negligence" was too narrowly applied herein. This Court, we submit, unduly assimilated that concept to situations involving negligence instead of equating non-recovery with wilful misbehavior.

The *Aguilar* case laid down a broad and beneficent rule in favor of seamen with regard to the right to recover maintenance and cure, and emphasized that *wilful misconduct* must exist to bar that right. Thus, the Court there said:

> "So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. Peterson v. The Chandos, 6 Sawy 544, 4 F. 645 (DC); see also The J. F. Card, 43 F. 92 (DC); The Ben Flint, 1 Abb (US) 126, 1 Biss 562, Fed. Cas. No. 1,299 (DC). Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. The Ben Flint, 1 Abb (US) 126, 1 Biss 562, Fed. Cas. No. 1,299 (DC) supra." (Pp. 730-1).

[fol. 148] The instances betokening disqualifying misconduct were shown by that Court to have an element of wilfulness. Thus:

> "The traditional instances are venereal disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore." (P. 731)

A tendency on the part of recent cases to limit the seaman's rights was condemned by the Court as "consonant neither with the liberality which courts of admiralty traditionally have displayed toward seamen who are their wards nor with the dictates of sound maritime policy." (P. 732)

The Court expounded as follows the necessity for a liberal attitude in behalf of seamen:

> "Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations

which brought the liability into being dictate it should be in the sailor's behalf." (P. 735-6)

The cases cited by the Court also stress the elements of wilfulness on the one hand and liberality on the other. Thus, in Peterson v. The Chandos, 4 F. 645, 651, where negligence on the part of a seaman was held not to preclude a recovery for maintenance, the Court said:

> "It is the well-settled law that a seaman receiving an injury, or being sick in the service of the ship without his fault, is entitled to be cured or cared for at the expense of the vessel (citing cases). And the fault which will forfeit this right upon the part of the sea-[fol. 149] man must be some positively vicious conduct, such as gross negligence or wilful disobedience of orders. Ordinary negligence, consistent with good faith and an honest intention to do his duty, is not sufficient. (Citing cases.) The propriety and good policy of this rule is eloquently vindicated by Mr. Justice Story in *Harden* v. *Gorden, supra,* 547, and in the application of it a court of admiralty will not be quick to find cause to exclude the seaman from its benefits."

In The Ben Flint, 3 Fed. Cas. No. 1299, the Court said:

> "Sailors are wards of the admiralty, and are rather excused than condemned for accidental mistakes while in the faithful and obedient discharge of duty. * * * Ordinary negligence, consistent with entire good faith, as in this instance, should not prejudice a sailor's just rights. The marine law rather overlooks ordinary negligence, but punishes those gross faults and vices which affect or prejudice the ship's service or discipline. * * * To forfeit a claim for care or attendance under the rule, the disability or sickness of the seaman must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, wilful disobedience to orders, and persistent neglect of duty."

In the recent case of *Kable* v. *U. S.*, 169 F. (2) 90, this Court spoke of "wilful misconduct" rather than of gross negligence as the disqualifying factor.

In the present case, this Court, in making merely "gross negligence" the test, consequently detracted from the force and spirit of the traditional and established policy governing the right to maintenance.

Moreover, where the term "gross negligence" has been used, as in some of the foregoing cases, it appears to connote or be juxtaposed with wilful misconduct, bad faith, [fol. 150] fraud, or other conscious or deliberate misbehavior. It is not employed as a mere variant of the general concept of negligence, requiring consideration of degrees of care or probability.

It may be noted that in other situations, not involving seamen, the term "gross negligence" has been assimilated to the concept of wilful misconduct. Thus, in *Crowell* v. *H. R. & R. Trucking Co.,* 157 F. (2d) 963 (CCA 5th), it was held that the terms "gross negligence" and "wilful and wanton misconduct" are synonymous. In *Krueger* v. *Taylor,* 132 F. (2d) 736 (U.S. Ct. App. D.C.), the Court said that gross negligence should be "wanton or reckless conduct", that a "momentary" failure to be alert and observant is not gross negligence, and that negligence "to be gross it should shock fair-minded men". In *McAlester* v. *Sinclair Refining Co.,* 146 F. (2d) 36 (CCA 5th), the Court, in stating that "gross negligence is positive or affirmative rather than merely passive or negative", and that it should "indicate wantonness or malice", also stated that it

> "should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it."

The test of wilfulness is better calculated than the gross negligence test, if the latter is regarded as simply being within the domain of negligence law, to admit of easier [fol. 151] administration and to facilitate the protection of a seaman's interests.

Where wilful misconduct is to be searched for, the inquiry is relatively simple, and there is not much room for different people to disagree as to the content of that term or as to its application. We are not obliged to make fine distinctions dependent essentially on degree. Where "gross negligence" is to be given definition or application, we enter a sphere fraught with doubt, uncertainty, and great possibility of dispute among different reasonable persons. Thus, this Court and the trial Court did not see eye to eye as to the existence of "gross negligence" herein.

If, as this Court asserted in its opinion herein, gross negligence "poses a question which is always difficult to answer", this should be an added persuasive reason not to make gross negligence determinative of a seaman's rights. Bearing in mind, as stated in the *Aguilar* case, that "the nature and foundation of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes", we should not embrace a test which necessarily involves an excursus into a domain of refined philosophical or psychological analysis. See *Moisan* v. *Loftus*, decided by this Court December 1, 1949.

To try to distinguish between ordinary negligence and gross negligence, particularly in situations where the [fol. 152] environment, experience and mentality of seamen —matters usually not shared by lawyers and judges—are the pertinent factors, may result in keen and interesting analysis, but, even unwittingly, it may be at the expense of that "liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards" (*Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 529). This Court has found in the policy of "the traditional protection accorded seamen as wards of the admiralty" an additional factor warranting a seaman's right to recover in a situation otherwise noncompensable (*Krey* v. *U. S.*, 123 F. (2d) 1009, 1010).

In the light of the foregoing cases, we submit that the test of mere "gross negligence" adopted by this Court is unduly restrictive and sacrificial of libelant's rights; that it has legal and factual implications which do not equitably or practicably serve the interests of seamen; that it does not promote the policy of protecting this Court's wards; that it involves unnecessarily difficult inquiries foreign to the spirit of the "rules devised for the benefit and protection of seamen"; that it imposes an undue burden on seamen; and that it should not be invoked here. Unless libelant is shown to have been guilty of wilful misconduct, his right to recover maintenance should not be barred. [fol. 153] In the present case, there was, of course, no wilful misconduct. Even if libelant's negligence were of an aggravated character—which we do not concede—it would not yet be misconduct, certainly not wilful misconduct. It would still be negligence.

Noting that in some respects the liability for maintenance and cure is greater than the employer's liability under general workmen's compensation statutes (See *Aguilar* v. *Standard Oil Co., supra; Kable* v. *U. S., supra*), and that under such statute recovery may be had even if the injured employee were "stupidly negligent" (*Mausert* v. *Albany Builders' Supply Co.*, 250 N. Y. 21, 23), and further noting that the liability for maintenance and cure has aspects of "job insurance" (*Smith* v. *U. S.*, 167 F. (2d) 550 (CCA 4th); *Robinson on Admiralty*, 291), there is further justification for not holding libelant herein to the relatively rigorous and narrow standard which was here applied.

Where in Warren's conduct was the "*positively vicious* conduct" (*Peterson* v. *The Chandos, supra*) or the "*vicious or* unjustifiable conduct" (*The Ben Flint, supra*) specified in both cases (both cited in *Aguilar*) as the meaning of "gross negligence" as there used? Warren's interest was -esthetic beauty--the "scene" or "view"—completely opposite to "vicious conduct", and evidencing, rather, precisely that relaxation mentioned in *Aguilar* vs. *Standard Oil Co.*

[fol. 154] Point II

The Facts Show that Even under the Standard Adopted by This Court Libelant Was Not Grossly Negligent

Neither our brief on the appeal nor this Court's opinion refers to a number of facts appearing in the record which seem to demonstrate conclusively—or at least to warrant a finding—that libelant had exercised due care and had in no event been guilty of gross negligence. We respectfully present these facts here.

Libelant's fall was not from a cliff, as the opinion herein states, but from a ledge or platform which was an extension of a room (113-4). The room had large French doors which were opened and faced the water, and a breeze was blowing in (197-8). The ledge was about 2½ to 3 feet wide (199) and "was quite a good length", being "probably to the nearest calculation about three or four sets of doors, with a post between or some setup of that type" (259).

It was what might be called "the edge of the room" (203-4). Other people went on the ledge to look at the scenery and walked away (201). As libelant testified:

> "Q. Were there any other people on that ledge?
>
> A. Yes, there were people all around there. I judge there were five or six people around in that room and out to the edge, and there was probably some on each side of me. I really didn't pay any attention because I was thinking about the scenery out across the bay" (262-3).

[fol. 155] On the ledge were masonry posts, which were regular parts of the building (199-200). The posts held up the roof (259) which came over and covered the ledge (260). Attached to a post was a metal pipe or rod which went from the floor of the ledge up above him (209). It was about a half-inch in diameter (114) and was up to 12 feet long (205). There "were brackets on it" which fastened it to the post. They were "Some kind of metal brackets fastened in the masonry" (206).

Before taking hold of this rod, libelant looked at it to see whether it was all right. Thus, he looked at it "just casually. As you would glance on it, if it would look all right" (208). It appeared to him to be "solid" (253) and to be affixed to the post as a "hand-hold" (209). It seemed to be there more as a hand-hold than as a lightning rod (208). As he testified:

> "Q. Was there anything about the structure which would lead you to suppose that it was there because somebody want- to hold on to it rather than for some other reason? A. On second thought it seemed to have —it went nowhere near the length of the floor. *It was probably more of a hand-hold than anything else.*
>
> Q. And you think because it went from the floor of the ledge up above you that *it was something to hold on to?* A. *It possibly was for that purpose more than any other reason.*
>
> Q. What you are telling us now I take it, is something that you have considered this structure and this attachment to the post and *you now think it may have been there to hold on to?*

> [fol. 156] "A. From your remarks and one thing or another you bring out points that I did not think of before, and perhaps maybe *you are more correct than my* first observation" (209-210).

When he was about six inches to a foot away from the edge, he took hold of the rod and leaned over, and could see another ledge about 15 feet below (247-9). He held "the iron with the idea it was up there solid" (253). Wholly unexpectedly the rod became loose and caused him to lose his balance (114, 253). Thus, "it let loose unexpectedly, which was quite a surprise", and "I did not have time to recover myself, so I held on to it and I went straight down" (114-5). The rod "pulled loose so easily that it was such a quick surprise that I couldn't recover myself" (202).

We respectfully submit that the foregoing testimony warranted the trial Court's finding that libelant had not been grossly negligent or reckless. The observation he made of the rod was sufficient under the circumstances. He said that "Naturally you wouldn't make a very close observation" (208). We do not believe the average man would make "a very close observation". We submit that failure to make "a very close observation" is not gross negligence.

Germane here is *Moisan* v. *Loftus, supra,* where this Court held that no gross negligence, but at most ordinary negligence, existed where a truck driver sped over 50 miles per hour on low beam headlights over an unfamiliar country road at midnight and skidded over a frozen patch [fol. 157] which he had not noticed. There, this Court said:

> "Confining ourselves therefore to the factor of probability, it appears to us that the chance that the truck would leave the road that night was slight."

Similarly, it may justifiably be said here that the chance that the rod libelant had held would break loose was slight.

In the *Moisan* case, this Court said:

> "Even if it was careless—which we question—not to apprehend that what looked like water might be frozen, but it was at least not reckless to think that it would be water. The most that we can see in the evidence is the kind of carelessness which all of us fall

> into every day, and which does not condemn those guilty of it in the somewhat rhetorically condemnatory terms of the accepted definition."

Similarly, it may justifiably be said here that libelant was not reckless in not apprehending that the rod was not securely attached to the post.

If libelant was at fault, the fault was minor, ordinary, and unconscious. There was no egregious recklessness or deliberate disregard of any effort to exercise care or to form a judgment as to the purpose of the rod. Libelant had no reason to believe that his judgment that the rod was a hand-hold was erroneous. The danger was hidden and unknown and resulted from the circumstance not that the rod was not a hand-hold but that it was loose. That it was loose was not apparent to the sense of sight which libelant exercised. We submit that he was not required, at the risk [fol. 158] of being held grossly negligent, to test the rod by exercising his sense of feeling before using it for the purpose it appeared to have.

Persons stepping into unattended elevators do not first test the floor to see whether the elevator may fall because of a loose cable. Persons leaning against guard rails in the subway do not first test the rails to see whether they are too loose to bear weight. Persons holding on to straps in a train do not first test the straps to see whether they are too loose to sustain weight. Similarly, libelant acted in a normal manner in taking hold of the rod after it appeared to him to be a "hand-hold".

We submit that to hold that libelant had been guilty of gross negligence and should be barred from recovering merely maintenance and cure goes unduly beyond what the conduct of ordinary men, the authorities, and the interests of justice require.

[fol. 159]

Point III

Libelant Is Entitled to a Recovery under the Shipowners' Liability Convention of 1936

Under the Shipowners' Liability Convention of 1936, effective for the United States and its citizens on October 29, 1939 (54 Stat. 1693), by Presidential Proclamation, the liability of the shipowner appears to be absolute. Thus, clause "1" of Article 2 of said Convention provides as follows:

> "1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury."

Clause "2" of said Article provides for exceptions as follows:

> "2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;
>
> (b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;
>
> (c) sickness or infirmity intentionally concealed when the engagement is entered into."

While clause "1" authorizing the recovery is self-executing, the exceptions permitted by clause "2" are not operative in the absence of Congressional legislation giving [fol. 160] them effect (Stone, C. J., in *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 738).

Accordingly, in the present case even if there were culpable misconduct on the part of the libellant, he would not be precluded from, but rather would be entitled to, a recovery under said Convention. It may also be noted that under clause "2" aforementioned, the exception based on misconduct of the injured person requires the misconduct to be "wilful". This is a further indication of the policy of the law not to withhold a recovery from an injured seaman where his misconduct is not the result of a wilful act.

The Importance of the Case

No right could be more important to seamen than maintenance and cure; and any "leeway" is to be made *"in the sailor's behalf" (Aguilar, supra).* This Court's decision not only gives no "leeway" to the sailor, but shifts to the opposite trend the basic principles on which maintenance and cure rests. Its importance is shown also by Judge

Medina's careful opinion, and his entertaining a motion by respondent for reargument below. We submit this Court should review this all important question now at the libelant's instance. We submit it is so all important that, unless the Court is disposed forthwith to amend its decision in this respect, leave should be granted for new briefs and oral reargument.

[fol. 161] Conclusion

It is respectfully submitted that the Court erred in points of law and fact and should in justice, grant libelant a rehearing.

Respectfully submitted, Saul Sperling, Proctor for Libelant.

Lester Lyons, Advocate.

[fol. 162] It is certified that this petition is well based in law and fact and not made for the purpose of delay.

Dated: New York City, New York, January 11th, 1950.

Respectfully submitted, Saul Sperling, Proctor for Libellant; Office & P. O. Address, 61 Whitehall Street, New York City, New York.

[fol. 163] UNITED STATES COURT OF APPEALS FOR THE SE
CIRCUIT

No. 45—October Term, 1949

(Petition filed January 11, 1950. Decided March 2, 1

Docket No. 21410

WALTER K. WARREN, Libellant-Appellee,

vs.

UNITED STATES OF AMERICA, Respondent

and

AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appel

Before: L. HAND, SWAN and FRANK, *Circuit Judg*

PETITION FOR REHEARING

Saul Sperling, Proctor for libellant-appellee, Le
Lyons, of counsel.

Irving H. Saypol, United States Attorney, Proctor
respondent-appellee, United States of America; Ki
Campbell, Hickox & Keating, and Walter X. Connor
Vernon S. Jones, of counsel.

[fol. 164] SWAN, Circuit Judge:

By petition for rehearing the libellant has presented
contention that our decision disregards the provision
the Shipowners' Liability Convention of 1936, proclaime
the President to be effective as to the United States an
citizens as of October 29, 1939, 54 Stat. 1693-1704. Artic
of the Convention is printed in the margin.[1] The libel

---

[1] "Article 2.

"1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the
specified in the articles of agreement for reporting for
and the termination of the engagement;

(b) death resulting from such sickness or injury.

argues that while Clause 1 is self-executing, the exceptions permitted by Clause 2 do not become operative without express Congressional action putting them into effect. This was the opinion expressed by Chief Justice Stone in concurring in the result in *Waterman Steamship Corp.* v. *Jones*, reported in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724 at 738. Further support for the view that the Convention is self-executing may perhaps be found in language used without discussion of the problem in *O'Donnell* v. *Great Lakes Co.*, [fol. 165] 318 U. S. 36, 42 and *Farrell* v. *United States*, 336 U. S. 511, 517.

If it be assumed that Clause 1 of Article 2 is self-executing, there would seem to be equal reason to make the same assumption as to Clause 2, unless the phrase "national laws or regulations" must be interpreted to exclude decisional law and refer only to legislation. It is true that Chief Justice Stone in the *Aguilar* case, *supra*, after stating that the first clause of Article 2 is self-executing went on to say "and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect." This bald statement of opinion does not disclose any reasons in support of it, and despite the high regard we have for any utterance of Chief Justice Stone, independent examination of the question constrains us respectfully to disagree. When the Convention was proclaimed to be effective, the existing maritime law of the United States recognized not only the shipowner's duty to pay maintenance and cure but also exceptions to that duty in case the seaman's injury or sickness was due to his own

---

2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined."

"wilful act, default or misbehavior" or in case he "intentionally concealed" sickness or infirmity existing when he signed the ship's articles. These are the same exceptions in respect of which Clauses 2(b) and 2(c) of Article 2 declare that "national laws or regulations may make exceptions." While it is conceivable that Article 2 contemplated that Clause 1, which is declaratory of the existing duty to pay maintenance and cure, should be self-executing but that the exceptions presented by Clause 2 should not be operative unless and until carried into effect by Congressional legislation, it seems to us most improbable that such a result was intended. It would mean that part of the existing decisional law was to continue and part was to be repealed, no matter how long the repealed part had been the settled [fol. 166] policy of the state; and that to re-establish that policy the state must take affirmative legislative action. In the meantime, the repeal would benefit only seamen who are least deserving of protection, since their sickness or injury resulted from their own default or was intentionally concealed from their employer. We cannot believe this was intended. Furthermore, it may be noted that Clause 3 of Article 4 provides that if there is "in force" in the territory in which the vessel is registered, "a scheme applying to seamen of compulsory sickness insurance," etc., such "scheme" will modify the general rule of liability declared by paragraph 1 of Article 4. In other words, it does not require legislation to make effective exceptions to the general rule if a "scheme" is already "in force." It is true that the language of Clause 3 of Article 4—"national laws or regulations may provide"—is not precisely the same as in Clause 2 of Article 2, "national laws or regulations may make exceptions in respect of." But in substance we think it is the same. Article 12 also indicates that not all existing decisional law is to be repealed. Our study of the Convention leads us to the conclusion that if Clause 1 of Article 2 is self-executing so also is Clause 2. If, on the other hand, Clause 1 of Article 2 is not self-executing the Convention does not apply. Either construction of Clause 1 leads to the conclusion that our decision is not affected by the terms of the Convention.

As his final argument the libellant urges that even if Clause 2 is to be deemed self-executing, gross negligence is not within the exception of injury due to the "wilful act, default or misbehavior" of the seaman. These words are used to describe conduct which will preclude recovery of maintenance, and that is precisely the meaning of "gross negligence" as stated in our original opinion.

The petition for rehearing is denied.

[fol. 167] Frank, Circuit Judge (dissenting):

O'Donnell v. *Great Lakes Co.*, 318 U. S. 36, 42, and *Farrell* v. *United States*, 336 U. S. 511, 517, seem to me to leave no doubt that the Supreme Court has held provisions of the Convention, similar to Clause 1 of Article 2, to be self-executing. The only question, then, is whether Clause 2 of Article 2—*i. e.*, "that national laws or regulations may make exceptions"—is to be interpreted as if it read "existing national laws, regulations or decisional rulings, shall constitute exceptions." Chief Justice Stone, in his concurring opinion in *Waterman S. S. Co.* v. *Jones*, reported in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 738, said that he was of "opinion that Article 2, Clause 1 of the Treaty authorizing the recovery is self-executing, and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect. (See letter of Secretary of State to the President, dated June 12, 1939, quoted in H. R. Rep. No. 1328, 76th Cong., 1st Sess., pp. 5-7.)"

This interpretation seems to me to be in accord with both the literal and reasonable meanings of the words, and is supported by the cited interpretation given by the Secretary of State. The construction given by my colleagues seems to me to be unnecessarily complicated and insufficiently sustained by persuasive reasons to justify a disregard of Chief Justice Stone's views. My colleagues' use of Clause 3 of Article 4 as an aid in construing Clause 2 of Article 2 is weak, I think, for two reasons: (a) Clause 3 of Article 4 contemplates an existing "scheme" created by statute, not by a mere decisional product; and (b) it makes no reference to "exceptions," as does Clause 2 of Article 2.

[fol. 168] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of March, one thousand nine hundred and fifty.

Present: Hon. Learned Hand, Chief Judge; Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

WALTER K. WARREN, Libellant-Appellee,

v.

UNITED STATES OF AMERICA, Respondent; AMERICAN SOUTH AFRICAN LINE, INC., Respondent-Appellant

A petition for a rehearing having been filed herein by counsel for the Libellant-Appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) Alexander M. Bell, Clerk.

[fol. 169] [Endorsed:] United States Court of Appeals, Second Circuit. Walter K. Warren v. United States of America, et al. Order. United States Court of Appeals, Second Circuit. Filed March 2, 1950. Alexander M. Bell, Clerk.

[fol. 170] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 171] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 87

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

PETITION
FOR
WRIT
OF
CERTIO-
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IN THE

Supreme Court of the United States

October Term, ~~1949~~ 1950

No. 87

Walter K. Warren,

Petitioner,

—against—

United States of America, as owner of the Steamship "ANNA HOWARD SHAW", and American South African Line, Inc., as operator of the Steamship "ANNA HOWARD SHAW",

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Saul Sperling
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Proctor for Petitioner

Saul Sperling
Charles A. Ellis
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1949

No.

Walter K. Warren,

Petitioner,

—against—

United States of America, as owner of the Steamship "ANNA HOWARD SHAW", and American South African Line, Inc., as operator of the Steamship "ANNA HOWARD SHAW",

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Walter K. Warren, an American seaman, respectfully shows:

Summary Statement of Matter Involved

The petition is by an American seaman for a writ of certiorari to review a decree of the United States Court of Appeals for the Second Circuit, entered the 16th day of March, 1950, which, while reversing, pursuant to stipulation, the decree of the United States District Court for the Southern District of New York, which awarded to petitioner-libellant maintenance in the sum of $644.16 and $36.00 costs against the respondent, American South African Line, Inc., upon the ground that under *Fink* v. *Shepard S.S. Co.*, 337 U. S. 810, decided pending said appeal, only the United States of America as owner could be held liable for maintenance, and while holding that the District Court had erred in dismissing for improper venue under the Suits in Admiralty Act, 46 U. S. C. Section 742, the libel against the respondent, United States of America, nevertheless affirmed "on the merits" the dismissal of the libel against the United States. This was put upon the grounds that petitioner was guilty of "gross negligence" barring his claim under the general maritime law and, with one judge dissenting, that such decision was not affected by the terms of the Shipowners Liability Convention of 1936 (54 Stat. 1693-1704).

The District Court had held on the merits that "If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another"; that the only definition of "gross negligence" which will "fit into the pattern of the maintenance cases" is that of "a reckless disregard of safety", and that petitioner did not act in reckless disregard of his own safety nor was he grossly negligent.

Material Facts

Respondents offered no evidence with respect to the happening of the accident and rested at the close of petitioner's case.

Petitioner was a messman in the steward's department of the SS. ANNA HOWARD SHAW, on his first trip overseas, and had signed articles and joined the ship June 1, 1944 (R. 32). The ship was in port near Naples, Italy, and petitioner went ashore on shore leave pass issued by the

Captain (R. 33). Three men, the ship's carpenter, another messman and petitioner, walked about sightseeing for a time and then went into a dance hall, comparable to U. S. O. clubs, where American soldiers were entertained (R. 34-35, 65-66), five or six American soldiers being inside (R. 66), and outside which were a jeep and two American M. Ps., to whom he talked casually (R. 40, 65-66). People other than the Americans inside were well dressed and included one Italian woman schoolteacher who spoke English, and with whom he talked (R. 65), and a few others who could talk English (R. 81).

Petitioner enjoyed nature and scenery (R. 37). From one of the rooms large French doors were open onto a platform or ledge some three feet wide (R. 38, 68) and three or four sets of doors in length (R. 87), facing the sea and affording a beautiful view toward the Isle of Capri, and of the water hitting the stone below the platform and spraying (R. 66, 67, 37-8). He observed other people go over and onto the ledge and out to the edge and look, and so did he (R. 67, 88). He stood a few seconds, perhaps three to five minutes, before falling when a rod which he grasped gave way, and so surprised him that he lost his balance and fell (R. 68, 38). The rod did not extend to the floor, but appeared to be a hand-hold to hold on to (R. 70). He was thinking about the scenery out across the bay (R. 88, 68, 204). He "somehow or other" took hold of the rod, and as he did so and looked out a bit to see better the view, the rod let loose; surprised, he did not have time to recover himself, and fell below to his injury (R. 38-39).

He sustained a fracture of the distal end of the right tibia and fibula resulting in an osteomyelitis, which required the performing of an open reduction and which hospitalized him from October 30, 1944 to November 17, 1944 (R. 40) and from December 8, 1944 to December 21, 1944

(R. 43) and from February 27, 1945 to May 28, 1945 (R. 48) and which disabled him to July 1, 1945 (R. 55).

The Basis of This Court's Jurisdiction

The judgment sought to be reviewed was rendered by the United States Court of Appeals, Second Circuit, and is dated March 16, 1950.

It involves peculiarly Federal law and treaty provisions, affecting the most cherished rights of American seamen.

The treaty involved is the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704.

The jurisdiction of this Court is found in 28 U. S. Code, Section 1254(1) and 2101(c).

Questions Presented

A.

1. Are Clauses 1 and 2 of Article 2 of said Convention both self-operative, or both inoperative without legislation, or is clause 1 self-operative, and clause 2 inoperative without legislation or regulation thereunder?

2. Is Clause 1 of Article 4 of said Convention self-operative?

3. Are the words "wilful act, default or misbehavior" in Clause 2 of said Convention "used to describe conduct which will preclude recovery of maintenance," without national legislation thereunder, as stated by the majority of two judges in the Court of Appeals herein, or are they used to describe conduct in respect of which a government party to the Convention "may make" exceptions, by na-

tional legislation or regulation thereunder, and consequently inoperative to preclude recovery in the absence of legislation or regulation thereunder, as held by the dissenting Judge herein?

4. Whether said Convention, and in particular Clauses 1 and 2 respectively of Article 2 thereof, and Clause 1 of Article 4 thereof, are to be liberally or strictly construed: so as to promote and enlarge universally more uniform rights of recovery by sick or injured persons thereunder, or so as to restrict and narrow such rights and defeat universality through retaining, without legislation or regulation being made pursuant to the Convention, all the peculiar and differing restrictions previously formulated by judicial decisions or other laws or regulations in the various countries parties to the Convention.

B.

5. Whether the Court of Appeals, in holding Petitioner guilty of "gross negligence" and "grossly negligent," misused and misapplied said terms as signifying negligence with an epithet added, instead of wilful or vicious misconduct, and erred in overruling the District Court's decision that "If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another."

6. Whether "gross negligence", as interpreted by the Court of Appeals, bars maintenance and cure (a) under the general maritime law, and (b) under the said Convention.

7. Whether Petitioner was guilty of venial negligence or of gross negligence; of momentary inadvertence and

lack of considered carefulness, or of wilful or vicious misconduct.

8. Whether indulgence of an appreciation for the aesthetic is to be judicially outlawed for seamen while on shore leave, by treating as wilful or gross misconduct barring maintenance and cure a momentary lack of studied carefulness, inadvertence or error of judgment, while momentarily entranced by a scene of extraordinary natural beauty, in contrast to treating similar negligence or worse conduct as venial where the rough amusements of seamen more familiar in Court decisions occur.

C.

9. Whether the Court of Appeals was justified in holding that maintenance and cure must be denied because to award maintenance and cure would be to make the shipowner an insurer of the seaman's safety.

Reasons for Allowance of the Writ

A.

1. Countless injuries occur to American seamen yearly which, whether or not involving claims for damages, result in claims and litigation for maintenance and cure. Claims involving injuries sustained while on shore leave or on the vessel are affected and probably controlled by the Shipowners Liability Convention of 1936, 54 Stat. 1693, ratified as a treaty and effective as to the United States and its citizens as of October 29, 1939. Yet, despite this Court's decisions in *O'Donnell* v. *Great Lakes Dredge & Dock Company,* 318 U. S. 36; *DeZon* v. *American President Lines,* 318 U. S. 660; *Aguilar* v. *Standard Oil Company,* and *Water-*

man Steamship Corporation v. *Jones,* 318 U. S. 724, and *Farrell* v. *United States,* 336 U. S. 511, all decided since the effective date of the Convention, and in all of which it is mentioned, no decision has yet clearly defined even the basic features of seamen's rights under the Convention. Lower Court judges, lawyers, claim adjusters, and especially poor seamen, are confused and uncertain as to seamen's rights. Claims go unadjusted or are litigated, with uncertain and conflicting results, which, if rights under the Convention were authoritatively determined and defined, would be adjusted speedily.

This uncertainty, confusion and difference of opinion, so costly to suffering and destitute seamen, is manifested herein by the facts that (1) the Court of Appeals differed below, two to one, on the simple point whether a "shall be liable" clause is self-operative, and a "may make exceptions" clause inoperative to create exceptions, in the absence of legislation or regulation thereunder; and (2) the United States as owner-respondent argued in its brief below opposite to the argument it made on this point in this Court as owner-respondent in *Farrell* v. *U. S., supra.* (See its *Farrell* v. *U. S.* brief, at p. 18, footnote 8.)

2. The majority of two judges below wrote without assurance, confusing rather than clarifying the question, saying: "If it be assumed" that Clause 1 is self-executing, there "would seem" to be equal reason to make the "same assumption" as to Clause 2, "unless" etc.; " * * * it is conceivable" that Article 2 contemplated that Clause 1 should be self-executing and Clause 2 inoperative without Congressional legislation; " * * * if Clause 1 of Article 2 is self-executing so also is Clause 2. If, on the other hand, Clause 1 of Article 2 is not self-executing the Convention does not apply;" and " * * * our decision is not affected by the terms of the Convention" (179 Fed. 2d 923).

We submit that the decision of a maintenance and cure case cannot be "not affected by the terms of the Convention." The Convention by its terms "applies to all persons employed on board any vessel, other than a ship of war" (Article 1), and must be applied as controlling every case except where existing laws ensure "more favourable conditions than those provided by this Convention" (Article 12).

3. The decision is contrary to Article VI, Clause 2, of the Constitution making treaties, equally with laws, "the supreme law of the land." The Court should resort to the Convention for a rule of decision "as it would to a statute" (*Head Money Cases*, 112 U. S. 580, 598-599).

4. The decision directly conflicts with the concurring opinion of Chief Justice Stone in *Waterman Steamship Corporation* v. *Jones*, 318 U. S. 724, 738, and with the decision of the Court of Appeals, Fourth Circuit, in *Smith* v. *United States*, 167 Fed. 2d 550, 552. It probably conflicts also with *Farrell* v. *U. S.*, 336 U. S. 511.

5. It conflicts with the Presidential proclamation of the Convention "subject * * * to any exceptions * * * which may be made by legislation or regulations on the part of the United States of America" (54 Stat. 1704).

6. It conflicts with contemporary interpretation evidenced by the bill H. R. 6881 prepared and approved in conference by nine Federal Governmental Departments, Commissions and Boards, submitted by the President, introduced and approved by Committee, to implement the provisions of the Convention. Such bill contained no provisions to re-enact or make effective the "shall be liable" Clauses 1 of Articles 2 and 4 of the Convention; but contained in §4 of the bill a provision that "In accordance with

the provisions of the sections 2 and 3 of Article 2 of the convention, the shipowner is hereby excepted" with respect to specified liabilities. (See comparative texts of Covention and Bill, in H. R. Report No. 1328, 76th Congress, 1st Session, pp. 38-39.)

Such bill never became a law. The bill represented, however, as respects what matters require legislation to be operative, the views of the Maritime Commission, Employees Compensation Commission, Social Security Board, Maritime Labor Board, Department of Labor, Department of Justice, Treasury Department, Commerce Department and State Department, all represented at a series of conferences at which it was drafted (Department of Commerce letter, H. R. Report 1328, *supra*, p. 49), and of the President; and was approved, without expression of views on this point, by a House Committee.

7. It conflicts with contemporary opinions, given by letters in connection with the drafting and introduction of H. R. 6881. of the Secretary of State (H. R. Report 1328, *supra*, pp. 6, 7); Secretary of Commerce and Acting Solicitor (*Id.*, p. 16); 1937 and 1939 Chairmen of the Maritime Commission (*Id.*, pp. 19, 31, 32) and Secretary of Labor (*Id.*, pp. 48-49) that Clause 1 of Article 2 is self-executing, establishes liability and needs no legislation, but that Clause 2 of Article 2 requires that if exception is to be made "it is necessary to do so affirmatively by statute" (*Id.*, p. 7).

These evidences of executive construction are entitled to great if not controlling weight (*Factor* v. *Laubenheimer*, 290 U. S. 276, 295-298; *Charlton* v. *Kelly*, 229 U. S. 447, 468; *Sullivan* v. *Kidd*, 254 U. S. 433, 442).

8. It ignores and is contrary to the manifest opposite meanings, as respects operativeness, of the terms "shall be

liable" in Clause 1, and "may make exceptions" in Clause 2, of Article 2. *Cf.* Clauses 1 and 2 of Article 1.

9. It conflicts with and renders meaningless the provision of Article 12, that nothing in the Convention shall affect any law, award, custom or agreement "which ensures more favourable conditions than those provided by this Convention;" and the effect given thereto in *O'Donnell* v. *Great Lakes Dredge & Dock Company*, 318 U. S. 36, 42; Cf. *Farrell* v. *U. S.*, 336 U. S. 511. The alleged pre-Convention test applied below being less favorable than the "controlling" (*Farrell* v. *U. S.*, *supra*) self-operative Convention test that the injury merely occur "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement" (Article 2, Clause 1); the latter alone is controlling in absence of legislation making the former effective as an exception, even were this permissible in view of the word "wilful" in Article 2, Clause 2(b).

10. It conflicts with decisions holding that welfare statutes made for the protection, benefit or aid of seamen are to be liberally construed to carry out their full purpose (*Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431; *Warner* v. *Goltra*, 293 U. S. 155, 156, 162; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Jamison* v. *Encarnacion*, 281 U. S. 635, 640).

The Convention should be construed in the same liberal manner (*Bacardi Corp.* v. *Domenech*, 311 U. S. 150, 163; *Asakura* v. *Seattle*, 265 U. S. 332, 342; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487).

11. It renders the Convention futile and meaningless, defeats its purposes, defeats universality and defeats the peculiarly American purpose to raise foreign standards and costs with our own. "The purpose of the convention was (1) to aid seamen and (2) to aid in the equalization of standards affecting seamen throughout the world" (Secretary Hull, H. R. Report 1328, *supra*, pp. 7, 9, 10) and to aid in equalizing operating costs (*Id.*, p. 10). See also, Secretary Perkins (*Id.*, pp. 17, 48); Maritime Commission (*Id.*, p. 31). If Clauses 1 of Articles 2 and 4 are inoperative here, or if the clauses permitting exceptions are self operative here, and interpretable to retain unaltered all exceptions and defenses under ancient laws, customs, codes and judicial decisions, then they must also have this effect in foreign countries parties to the Convention; particularly with this decision as a precedent.

B.

12. Whereas both the Convention and *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, sweep aside contentious defenses to maintenance and cure, which would limit its scope or hamper its simplicity of enforcement; the District Court and Court of Appeals both have treated the *Aguilar* decision as broadening or introducing new defenses, which both Courts call "gross negligence," agree they cannot define, but upon which they differ as to whether petitioner was guilty of "gross negligence."

The District Court held "the element of wilfulness" essential but absent.

The Court of Appeals held that it was necessary under *Aguilar* to assess "what degree of negligence" the seaman's conduct represented and that "the care which Warren took was very slight," represented "gross negligence" and was a bar (179 F. 2d 922).

Whether such a defense exists under *Aguilar* and the Convention is vitally important to seamen and shipowner.

13. The decision violates the Convention which, by Clause 1 of Article 2, makes the sole test for maintenance and cure, that the injury occur "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;" or, if Clause 2 is equally self-executing, requires that the "act, default or misbehavior" be "wilful," in order to except liability. The Convention does not mention "gross negligence."

14. The decision conflicts with the following decisions holding that "gross negligence" is simply negligence with an epithet added; and which, to have any other meaning, requires an evil motive of wilfulness, viciousness or fraud, in contrast to and completely distinct from negligence: *Milwaukee & St. Paul Ry. Co.* v. *Arms*, 91 U. S. 489, 493-494; *Western Union Telegraph Co.* v. *Eyser*, 91 U. S. 495, 496; *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252, 259; *New York Central Railroad Company* v. *Lockwood*, 17 Wall [84 U. S.] 357, 382-383; *The Steamboat New World* v. *King*, 16 How. [57 U. S.] 469, 474-475; *Westre* v. *Chicago M. & St. P. Ry. Co.*, C. C. A. 8, 2 F. 2d 227, 229; *Purple* v. *Union Pacific R. Co.*, C. C. A. 8, 114 Fed. 123, 130; *Oregon Co.* v. *Roe*, C. C. A. 9, 176 Fed. 715, 718; *Kelly* v. *Malott*, C. C. A. 7, 135 Fed. 74, 76; *Western Union Telegraph Co.* v. *Catlett*, C. C. A. 4, 177 Fed. 71, 74-75; *Hewlett* v. *Schadel*, C. C. A. 4, 68 F. 2d 502, 505-506; *Mayer* v. *Puryear*, C. C. A. 4, 115 F. 2d 675, 678; *Perkins* v. *New York Central R.R. Co.*, 24 N. Y. 196, 206-207; *Hanover Fire Ins. Co.* v. *Merchants' Transp. Co.*, C. C. A. 9, 15 F. 2d 946, 948, certiorari denied 273 U. S. 758; *Sorenson* v. *Boston Ins. Co.*, C. C. A. 4, 20 F. 2d 640, 643, certiorari denied 275 U. S.

555; *Standard Marine Ins. Co.* v. *Nome Beach Lighterage & Transportation Co.*, C. C. A. 9, 133 Fed. 636, 647-648.

Apparently, only where statutorily used to indicate "degree" is it so treated (*Conway* v. *O'Brien*, 312 U. S. 492; *Mayer* v. *Puryear, supra*).

15. It unwarrantably introduces a Vermont statutory "incommensurable subject matter" concept of "gross negligence" (*Moisan* v. *Loftus*, C. C. A. 2, 178 Fed. 2d 148, 149, cited by the Court below at 179 F. 2d 921), and tends to destroy the historic inclusiveness and simplicity of the right to maintenance and cure which enabled it to be "understood and administered without technical considerations", with "few exceptions or conditions to stir contentions, cause delays, and invite litigations" (*Farrell* v. *U. S., supra*).

16. The decision is inconsistent in holding that "Before" the *Aguilar* case it was not necessary but "Since *Aguilar*" it is necessary "to assess a libellant's degree of care" and "what degree of negligence" his conduct involved, and that "the pre-*Aguilar* cases are of little assistance"; and in yet citing, to justify the term "gross negligence," *Peterson* v. *The Chandos*, D. C. Or., 6 Sawy. 544, 4 F. 645; *The J. F. Card*, D. C. Mich., 43 F. 92; *The Ben Flint*, D. C. Wis., 1 Abb. (U. S.) 126, 1 Biss. 562, 3 Fed. Cas. No. 1299, cited in *Aguilar*; and *Jackson* v. *Pittsburgh S. S. Co.*, C. C. A. 6, 131 F. 2d 668.

17. The decision misconstrues and conflicts with *Peterson* v. *The Chandos, supra;* and *The Ben Flint, supra*, which use the term "gross negligence" with other expressions showing that wilfulness rather than negligence was meant; i.e.: *Peterson*: "the fault must be some positively vicious conduct, such as gross negligence or wilful disobedience of orders" (4 Fed. 651; cf. p. 647). *The Ben Flint*: "those gross faults and vices which affect or prejudice the ships

service * * * vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders, and persistent neglect of duty" (1 Abb. (U. S.) 130, 131).

18. It conflicts with the term as used in other early leading maintenance and cure decisions, i.e., Story, *J.*, in *Reed* v. *Canfield*, C. C. Mass., 1 Sumn. 195, 20 Fed. Case 426, No. 11,641: "gross negligence, that is, that sort of negligence, which the law denominates *crassa negligentia*, and which would operate somewhat like a fraud upon the owners" (1 Sumn. 206). *Walton* v. *The Neptune*, D. C. Pa., 1 Pet. Adm. 142: "vicious or unjustifiable conduct" (1 Pet. Adm. 151). Brown, *J.*, in *The City of Alexandria*, D. C. E. D. N. Y. 17 Fed. 390, 395: "his own gross and willful misconduct." Deady, *J.*, in *The City of Carlisle*, D. C. Or., 39 Fed. 807, 813: "The fault which will forfeit this right must be some positively vicious conduct, such as gross negligence or willful disobedience of orders."

19. It conflicts with this Court's decisions in *Aguilar* v. *Standard Oil Co., supra*; *Farrell* v. *U. S.*, 336 U. S. 511, and *The Osceola*, 189 U. S. 158, requiring a "wilful" element, i.e. *Aguilar*: "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection * * * The traditional instances are venereal disease and injuries received as a result of intoxication" (318 U. S. 731). *Farrell*: "The seaman could forfeit the right only by conduct, whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders and gross misconduct." *The Osceola*: "the sailor's willful misconduct" (189 U. S. 170).

20. It conflicts on the merits with decisions of other circuits, viz., *Ellis* v. *American Hawaiian S.S. Co.*, C. C. A. 9,

165 F. 2d 999; *Smith* v. *United States*, C. C. A. 4, 167 F. 2d 550; *Nowery* v. *Smith*, C. C. A. 3, 161 F. 2d 732, affirming, for reasons stated in, *Nowery* v. *Smith*, D. C. E. D. Pa., 69 F. Supp. 755; *Sundberg* v. *Washington Fish & Oyster Co.*, C. C. A. 9, 138 F. 2d 801; with *Peterson* v. *The Chandos*, 6 Sawy. 544, 4 F. 645; and we believe with the Second Circuit Court's own decisions in *Kable* v. *United States*, C. C. A. 2, 169 F. 2d 90, and *Reck* v. *Pacific-Atlantic S.S. Co.*, C. C. A. 2, 180 F. 2d, 866.

C.

21. The ruling that petitioner could not recover because recovery would make the ship "an insurer of his safety" (179 F. 2d 922) conflicts directly with the Fourth Circuit decision in *Smith* v. *United States*, C. C. A 4, 167 F. 2d 550, at 552; and, we believe, with *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, and with the Convention. It misapplies a rule applicable to indemnity but not to maintenance and cure, as shown by the Court's own decision in *Muruaga* v. *United States*, C. C. A. 2, 172 F. 2d 318, 320-321.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1949

Walter K. Warren,
Petitioner,

—against—

United States of America, As owner of the Steamship "ANNA HOWARD SHAW," and American South African Line, Inc., as operator of the Steamship "ANNA HOWARD SHAW,"
Respondents.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI

Statement and summary of the case, including the facts, are set forth in the Petition, pp. 1-4.

Opinions Delivered Below

The two opinions delivered in the District Court are published at 75 F. Supp. 210 and 76 F. Supp. 735. The three opinions delivered in the Court of Appeals are published at 179 F. 2d 919-924.

Grounds for Jurisdiction

Grounds for Jurisdiction have been stated in detail in Reasons for Allowance of the Writ, Petition, p. 6 *et seq.*

They include important questions, as to seamen's rights to maintenance and cure, and negligence as a defense thereto.

The case presents, apparently, for the first time by Petition, important questions as to the applicability, meaning and effect of the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704; whether specific provisions thereof are self-operative or inoperative in the absence of legislation thereunder; and whether, either under the Convention or under the general maritime law, negligence may be treated as a bar to maintenance and cure by an Appellate Court calling it "gross negligence," according to an unrelated Vermont statutory concept of "degrees" of negligence, and overruling the trial Court's decision that the "element of wilfulness" is essential to a defense, and that Petitioner was not guilty of conduct such as to bar his claim.

The Convention (Treaty) Provisions Involved

The treaty involved is the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704. The specific provisions to be construed and applied are the provisions of Clauses 1 and 2 of Article 2, and Clauses 1, 2 and 3 of Article 4, as follows:

"Article 2

"1. The shipowner shall be liable in respect of:

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

"2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;

* * * * *

"ARTICLE 4

"1. The shipowner shall be liable to defray the expenses of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

"2. Provided that national laws or regulations may limit the liability * * * to a period * * * not * * * less than sixteen weeks * * *

"3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(a) that a shipowner shall cease to be liable * * * from the time at which that person becomes entitled to medical benefits under the * * * scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the * * * schemes, even when * * * not covered by the scheme in question, unless he is excluded from the scheme by * * * restriction which affects particularly foreign workers * * *"

Assignments of Error

The Court of Appeals, Second Circuit, erred

A.

1. In holding that the decision of this maintenance and cure case is not affected by the terms of the Convention.

2. In holding that "shall be liable" provisions and "may make exceptions" provisions of the Convention are equally inoperative or equally self-operative, without legislation.

3. In not holding that Clauses 1 of Articles 2 and 4 of the Convention are self-operative, and Clause 2 of Article 2 inoperative, without legislation or regulations thereunder.

4. In not holding that Petitioner is entitled to maintenance and cure, under Clause 1 of Article 2 of the Convention, because his injury occurred "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement."

B.

5. In holding that negligence of Petitioner barred his claim for maintenance and cure.

6. In holding that Petitioner was guilty of "gross negligence" which barred his claim for maintenance and cure.

7. In holding that a seaman's right to maintenance and cure depends upon his "degree of care" or "degree of negligence."

8. In applying in a maintenance and cure case an unrelated State's statutory concept of "degrees of negligence."

9. In failing to hold that (i) the words "wilful act, default or misbehavior" in Clause 2(b) of Article 2 of the Convention, and (ii) the general maritime law, do not allow as a defense to maintenance and cure "gross negligence" as interpreted by the Court of Appeals.

C.

10. In holding that Petitioner is not entitled to maintenance and cure because to allow it would make the ship an insurer of his safety.

POINT I

Petitioner is entitled to maintenance and cure under the Convention. Clauses 1 of Articles 2 and 4 are self-operative, and Clause 2 of Article 2 inoperative, without legislation or regulations thereunder.

The Convention was duly adopted, ratified and proclaimed as a treaty, effective October 29, 1939 (54 Stat. 1693-1704; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 42; *Farrell* v. *United States*, 336 U. S. 511, 517).

As a treaty it is to be liberally construed to accomplish its full purposes (*Bacardi Corp.* v. *Domenech*, 311 U. S. 150, 163; *Asakura* v. *Seattle*, 265 U. S. 332, 342; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487).

Its purposes were "(1) to aid seamen and (2) to aid in the equalization of standards affecting seamen throughout the world" (Secretary Hull, H. R. Report 1328, 76th Congress, 1st Session, pp. 3, 9, 10).

There is applicable also, therefore, the principle that welfare statutes made for the protection, benefit or aid of seamen are to be liberally construed to carry out their full purpose (*Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431; *Warner* v. *Goltra*, 293 U. S. 155, 156, 162; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Jamison* v. *Encarnacion*, 281 U. S. 635, 640).

Where its provisions are applicable, the Court should resort to the Convention for a rule of decision "as it would to a statute" (*Head Money Cases*, 112 U. S. 580, 598-599).

As pointed out by Secretary Hull, "Many of the provisions of the Convention are considered to be self-executing, and there would appear to be no need to repeat verbatim the language of the Convention in a statute to make it effective" (H. R. Report 1328, *supra*, p. 6). This is so as to the "shall be liable" clauses, such as Clauses 1 of Articles 2 and 4.

Secretary Hull specifically held that Clause 1 of Article 2 is self-executing, and a Bill prepared by nine Federal Departments, Commissions and Boards so treated it. "Paragraph 1 of Article 2 of the Convention was not incorporated in the bill because of the belief (1) that it is self-executing in that it establishes liability, although no definite amount is provided" (H. R. Report 1328, *supra*, p. 6, *cf.*, the provisions of the Bill containing no provision comparable to Clause 1 of Article 2; *Id*, p. 38).

What could a statute add to the effectiveness of Clause 1 by reenacting verbatim its provisions, inasmuch as the Convention is, equally with a statute, itself "the supreme law of the land"? (U. S. Constitution, Article VI, Clause 2). Certainly a statute reading as does Clause 1 of Article 2 of the Convention would be applied and given full effect as measuring alone the conditions of liability, in the absence of any effective exceptions.

By contrast, as to the Convention provisions that National laws or regulations "may make exceptions" in respect of specifically limited matters, Secretary Hull said: "Some of the articles of the Convention, however, after stating the general rule, provide that national laws may make exceptions thereto. If this Government is to be excepted from certain obligations of the Convention or alterations in our present practice, it is necessary to do so affirmatively by statute" (H. R. Report 1328, *supra*, p. 6). The Bill accordingly contained a Sec. 4, relating to Clause 2 of Article 2 of the Convention; and whereas the Convention clause provided that national laws or regulations "may make" exceptions, Sec. 4 of the Bill provided that "In accordance with" such Convention provisions, the shipowner "is hereby excepted from the terms of the Convention" in respect to "liability for" stated injuries. Significantly, it omitted the word "default" from the Convention phrase "willful act, default or misbehaviour" (H. R. Report 1328, *supra*, p. 39).

The fact that the Bill was not enacted is indicative that Congress refused to make any exceptions.

These and the other indications of similar executive construction referred to in the Petition herein are entitled to great if not controlling weight (*Factor* v. *Laubenheimer*, 290 U. S. 276, 295-298; *Charlton* v. *Kelly*, 229 U. S. 447, 468; *Sullivan* v. *Kidd*, 254 U. S. 433, 442).

In *Farrell* v. *United States*, 336 U. S. 511, respecting Clause 1 of Article 4, this Court said that it "would seem controlling" (336 U. S. 517). The United States, as respondent in that case, moreover, argued in its brief, p. 18, footnote 8, that the "provisions are self-operative."

In *Waterman Steamship Corporation* v. *Jones*, 318 U. S. 724, at 738, Chief Justice Stone concurred specifically "on the ground that the recovery was authorized by the Shipowners Liability Convention, 54 Stat. 1695, which became effective before the date of respondents injury" and because:

> "He is of opinion that Article 2, Clause 1 of the treaty authorizing the recovery is self-executing, and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect" (318 U. S. 738).

In *Smith* v. *United States,* C. C. A. 4, 167 F. 2d, 550, 552, the Fourth Circuit specifically ruled that the language of Clause 1 that liability shall exist for injury occurring between the date for reporting for duty and termination of the voyage "manifestly covers shore leave as well as ship duty" and that, as respects the provision that national laws or regulations "may make exceptions" that "No law or regulation of this country makes any such exception; * * *"

The Convention obviously was intended to and does establish a coverage for the period of relationship, with no exceptions whatsoever unless specifically and separately made by legislation or regulation within the limits authorized by the Convention.

The Convention itself avoided any qualification which would be "deceptively simple and litigiously prolific" (*Cardillo* v. *Liberty Mut. Ins. Co.,* 330 U. S. 469, 479). Its "words leave no possible room for reading in an implied exception" (*Id.* p. 475). Clause 3(a) and (b) of Article 4, that national laws or regulations may provide that a shipowner shall "cease" to be liable, show that otherwise he is liable.

The question is one of tremendous importance to seamen. Moreover, the decision of this Court will be a precedent for all countries parties to this or other Conventions similarly worded. The Court of Appeals decision herein will be one disastrous to this or any similar Convention, if not reversed.

POINT II

The decision below violates both the Convention and the maritime law, and the decisions of this Court and courts of other circuits, as well as its own prior decisions, in holding that negligence of petitioner herein was "gross negligence" and a bar to maintenance and cure.

1. The Convention makes no provisions as to negligence, or "gross negligence". If Clause 1 of Article 2 is self-operative, but Clause 2 is not, then there is no exception under the Convention. If, however, Clause 2 be held equally self-operative, it allows of no exception covering negligence or "gross negligence", but only of causative "act, default or misbehavior" which is "wilful".

2. This, we submit, is equally true of our maritime law, and is the sole basis for the opinion of Secretary Hull and other Heads of Departments, Commissions and Boards who believed the Convention test was in accord with our maritime law. The errors of the Court of Appeals herein on this point are in applying to maintenance and cure, under the maritime law, an unwarranted and unworkable State statutory theory of "degree of negligence", and in finding Petitioner guilty of anything other than mere negligence.

3. After reaching back to borrow the term "gross negligence" from dicta in three District Court decisions rendered over half a century before this Court's decision in *Aguilar* v. *Standard Oil Company*, 318 U. S. 724, the Court of Appeals has then sought the meaning of the borrowed term, not from the old decisions from which borrowed (*Peterson* v. *The Chandos* (1880), D. C. Or., 6 Sawy., 544, 4 F. 645; *The J. F. Card* (1890), D. C. Mich., 43 F. 92; *The*

Ben Flint (1867), D. C. Wisc., 1 Abb. (U. S.) 126, 1 Biss 562, 3 Fed. Cas. No. 1299), but from a state (Vermont) statutory concept which the Court had recently examined in *Moisan* v. *Loftus,* C. C. A. 2, 178 F. 2d, 148, cited below at 179 F. 2d, 921.

It rejected the "wilful" and "vicious" element associated with the term as used in the *Peterson* and *The Ben Flint* decisions it relied on for using the term here at all and the "wilful" element in Clause 2 of Article 2 of the Convention, and applied instead the Vermont statutory "degree" concept which in *Moisan* v. *Loftus, supra,* it had designated as an "incommensurable subject matter" (178 F. 2d, 149).

All this, it attributed to *Aguilar;* saying as to this point of the borrowed term's meaning that the "pre-*Aguilar* cases are of little assistance in guiding us to a correct decision here" (179 F. 2d, 922), because "Before" *Aguilar* "it was not necessary to assess a libellant's degree of care when his injury occurred during a period of relaxation afloat or ashore, for he was barred from recovery"* (179 F. 2d, 921), but that "Since *Aguilar*" the "assessment of what degree of negligence" should be ascribed to an injured seaman's conduct had been "squarely presented."

---

* For its theory that "Before" *Aguilar* recovery was barred, the Court cited *Meyer* v. *Dollar S.S. Lines,* C. C. A. 9, 49 F. 2d 1002;—which this Court specifically disapproved in *Aguilar* as consonant "neither with the liberality which Courts of Admiralty traditionally have displayed toward seamen who are their wards nor with the dictates of sound maritime policy" (318 U. S. 732, note 45).

Thus, contrary to *Aguilar,* the decision rendered below treats the pre-*Aguilar* law as being, not as ruled in *Aguilar,* but as per *Meyer* which *Aguilar* disapproved; and treats *Aguilar* as representing, in effect, legislative repeal of the *Meyer* decision, and as creating new rights not existing "Before" but only "Since" *Aguilar.* Perhaps this is why, despite borrowing the words "gross negligence" from old District Court dicta, it treats of the term, not as involving the "wilful" or "vicious" meaning for which those source decisions used it, but the meaning which the terms signified in the State statute it had recently examined in *Moisan* v. *Loftus supra.*

4. The tremendous impact of this decision upon the maritime law of maintenance and cure, and the Convention, and its disruptive effect thereon, unless reviewed and reversed, is apparent from comparing both the lower Court's comments in *Moisan* v. *Loftus, supra,* and this Court's comments in *Conway* v. *O'Brien,* 312 U. S. 492 (respecting the same Vermont statute), with this Court's comments in *Farrell* v. *United States,* 336 U. S. 511, and *Aguilar* v. *Standard Oil Co., supra,* respecting maintenance and cure.

In *Conway* v. *O'Brien* this Court said of the Vermont statutory "gross negligence" definitions that:

> "The application creates the difficulties * * * Admittedly there are instances among the Vermont cases which might be logically cited to support a refusal to submit this case. About as many are upon the other side" (312 U. S. 495-496).

In *Moisan* v. *Loftus,* the Court of Appeals composed of the same judges who sat herein, said:

> "The difficulties are in applying the rule * * *; they arise from the necessity of applying a quantitative test to an incommensurable subject-matter; and the same difficulties inhere in the concept of "ordinary" negligence * * *
>
> "In conclusion we cannot help observing that, not only are the inherent uncertainties great in applying such a formula, but that they are greater for the Court of another jurisdiction, which cannot have the assurance that comes to those who have themselves framed the terms which they later construe" (178 F. 2d 149, 150).

Yet such is the concept which the same Court sitting herein, and citing *Moisan v. Loftus* to illustrate it, have ruled that *Aguilar* itself introduced, and that the Convention allows!

This ruling makes a seaman's right to maintenance and cure depend upon "inherent uncertainties great in applying such a formula" (*Moisan* v. *Loftus, supra*), and upon which Court, the trial Court, intermediate Appellate Court or final Appellate Court chooses to say it fits the conduct in a given case. It is a formula which this Court said in *Conway* v. *O'Brien, supra,* produces in equal number decisions for or against recovery.

It makes every case of maintenance and cure one for contest, litigation and appeal.

By contrast, in *Farrell* v. *United States,* 336 U. S. 511, at 516, this Court said of maintenance and cure:

> "It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations. The seaman could forfeit the right only by conduct whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct" (336 U. S. 516).

In *Aguilar* v. *Standard Oil Co., supra,* this Court said:

> "Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which

brought the liability into being dictate it should be in the sailor's behalf" (318 U. S. 735-736).

In like spirit the Convention provides, in Article 9 that:

> "National laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes concerning the liability of the Shipowner under this Convention."

and, in Article 11, that

> "This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to secure equality of treatment to all seamen irrespective of nationality, domicile or race."

5. We have found no case wherein this Court has ever held that negligence, however qualified by epithet, bars maintenance and cure; rather, it has held consistently that negligence is not a bar. Despite the use in a number of old lower court maritime decisions of the term "gross negligence"—usually as dicta in cases granting recoveries—this Court appears carefully to have avoided use of the term in maintenance and cure cases. The *Aguilar* and *Farrell* decisions, and *The Osceola,* 189 U. S. 158, each use formulae involving a "wilful" element. (See No. 19 of Reasons for Allowance of the Writ, Petition, p. 14 herein.)

This Court, moreover, has ruled often, as have the Courts of Appeals of other Circuits, that the term "gross negligence" is a confusing, troublesome and litigation-breeding misnomer, signifying merely negligence with an "epithet" added. (See cases cited in No. 14 of Reasons for Allowance of the Writ, Petition, pp. 12-13 herein.) When it partakes of another meaning, it involves "wilfulness" and not negligence at all (*Idem*).

In the one sense—merely negligence with an "epithet"—it cannot be allowed as a bar to maintenance and cure without violating this Court's consistent rulings that negligence does not bar maintenance and cure. (See *Farrell* and *Aguilar* cases, *supra,* and cases there cited.)

In the other sense—involving a "wilful" or "vicious" element—the term can serve no useful purpose as a tautological addendum to the consistently used formula "wilful misconduct" or the Convention term "wilful act, default or misbehavior" (Art. 2, Cl. 2(b)).

6. In the older maritime decisions where the term "gross negligence" is used, almost invariably it is with qualifying or accompanying words signifying a "wilful" or "vicious" conduct meaning. (See cases cited and terms quoted therefrom in Nos. 17 and 18 of Reasons for Allowance of the Writ, Petition herein, pp. 13-14.)

Notably, it was *The Ben Flint, supra,* which was singled out and cited separately for the "Only" bar expression in *Aguilar* v. *Standard Oil Co., supra,* at 318 U. S. 731, third sentence. And *The Ben Flint* expresses the formula as "vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders and persistent neglect of duty" (1 Abb. (U. S.) 131).

This, it will be noted, is precisely the sort of conduct which is distinguished even in *Conway* v. *O'Brien, supra,* as "equivalent to a wilful and intentional wrong" (312 U. S. 495).

The formulae in *Peterson* v. *The Chandos, supra,* and in *The City of Carlisle,* D. C. Or., 39 Fed. 807, 813 were "some positively vicious conduct, such as gross negligence or willful disobedience of orders." It needs no physical transposition of these or of the formula of *The Ben Flint* to perceive that, as respects "gross negligence" the expressions are the same when stated: "gross negligence, such as some positively vicious conduct" or "gross negligence, such as vicious or unjustifiable conduct."

Judge Story's formula in *Reed* v. *Canfield*, C. C. Mass., 1 Sumn. 195, 20 Fed. Cas. 426, No. 11,641 was very specific as to the wilful or "fraud" element, i.e.: "gross negligence, that is, that sort of negligence, which the law denominates *crassa negligentia*, and which would operate somewhat like a fraud upon the owners" (1 Sumn. 206).

In short, the writers of these old decisions never conceived of establishing as a bar to maintenance and cure some "degree" of merely negligent acts, as distinct from conduct that was wilful, vicious or fraudulent.

7. The grounds for forfeitures, penalties and punishments specified in 46 U. S. C. Sections 701, 704 and 710, indeed, are closely parallel to those recognized in the old decisions as bars to maintenance and cure and wages. In *The Superior*, 22 Fed. 927, 928, Judge Coxe, allowing recovery of wages and transportation by a discharged woman seaman, despite conduct "reprehensible in the extreme", said, after citing some of these forfeiture grounds:

> "But lesser offenses are looked upon as venial, and are leniently dealt with in the admiralty courts."

8. The decision, moreover, is contrary to and conflicts with those cited in No. 20 of Reasons for Allowance of the Writ (Petition, pp. 14-15), including decisions of the Ninth, Fourth and Third Circuits.

Ellis v. *American Hawaiian S.S. Co.*, C. C. A. 9, 165 F. 2d 999, cited by the Court below, as having "squarely presented" and decided the same question, is, we submit, opposite, both as to theory and result. It used the expressions "wilful misconduct or gross negligence" and "wilful nor gross misconduct". A seaman on shore leave dived three times into a pool having in it only four feet depth of water, and struck his head on the bottom on the third dive. The Court reversed a dismissal and remanded the case for determination of the seaman's wages and maintenance and cure for his injuries.

The distinction of the *Ellis* case on the merits made by the Court in relying on it below is tenuous and would require that for precisely the same dive causing precisely the same injury the shipowner would be exonerated if it were the first, or even possibly the second, rather than the third negligent dive. Moreover, even the successful negotiation by Ellis of two prior dives is paralleled here by the fact that Petitioner had safely looked from the platform for from three to five minutes before falling (R. p. 68). *Cf.* subsequent decision on remand *Ellis* v. *American Hawaiian S.S. Co.*, D. C. S. D. Cal., 77 Fed. Supp. 836, 837.

The Fourth Circuit Court of Appeals in *Smith* v. *United States*, C. C. A. 4, 167 Fed. 2d. 550, held that the District Court erred in disallowing (74 F. Supp. 275) maintenance and cure where a seaman broke his ankle while on shore leave at a friend's cottage.

The Third Circuit Court of Appeals, in *Nowery* v. *Smith*, C. C. A. 3, 161 F. 2d 732, affirmed an award where a seaman was injured in a fight in a barroom.

The ~~Ninth~~ Circuit Court of Appeals in *Sundberg* v. *Washington Fish & Oyster Co.*, C. C. A. 9, 138 F. 2d 801 held the District Court erred in denying an award where a negligent seaman while off duty was hit by a bullet shot by another seaman at sea lions.

As respects the very points of appreciable danger and lack of considered carefulness or "slight care", which the Court of Appeals called "gross negligence" herein, such as to bar maintenance and cure, and even the distance of the fall, in two stages, Peterson's fall in *Peterson* v. *The Chandos*, *supra*, decided in 1880, was either identically parallel, or involved less carefulness than here. Peterson, "a man above the average weight," went out upon a mere rope crane line, known to chafe and wear quickly from swaying on the stays, so as to last only a day or so (4 F. 648), and either stood or sat upon it "without other hold or support" (4 F. 647), and "without any precaution against its breaking, or observation as to its then condition" (4 F. 647-648), and fell first 30 feet until he struck a bottom-up boat and then 10 feet further to the deck (4 F. 647), when the rope gave way. The Court held that his negligence and failure to exercise "ordinary care and prudence" barred any claim for damages (4 F. 649); but that "The libellant, notwithstanding his want of caution in going upon the crane line, was clearly entitled to be cared for at the expense of the ship" (4 F. 651).

This Court has held in *Aguilar*, and the Convention certainly means, that the difference that the one injury occurred on ship and the other on shore leave does not change the seaman's right. Moreover, already the Court of Appeals decision herein is being cited by adjusters and attorneys for shipowners for the argument that negligence, by calling it "gross negligence", bars maintenance and cure whether the injury be on ship or ashore. *Peterson* v. *The Chandos*, cited with approval by this Court in *Aguilar*, and the decision of the Court of Appeals herein cannot both be sound, in the light of the *Aguilar* decision and the Convention.

In *Kable* v. *United States*, C. C. A. 2, 169 F. 2d 90, Judges Augustus N. Hand, Chase and Clark of the Second Circuit affirmed dismissal of a damage claim but reversed dismissal of the claim for maintenance and cure and remanded the case for further findings "particularly upon the issue of wilful misconduct" of libellant (169 F. 2d 94), where Chief Office Kable had been injured in a fight with Chief Engineer Svedman, which occurred subsequent to Kable's having knocked Svedman unconscious with a gun (169 F. 2d 91). All judges agreed that "wilful misconduct" must be the precipitating cause, in order to bar maintenance and cure, Judges Hand and Chase voting to remand for further findings, but Judge Clark voting to award maintenance and cure without further findings.

In *Reck* v. *Pacific-Atlantic S.S. Co.*, C. C. A. 2, 180 F. 2d 866, Judges Augustus N. Hand, Clark and Frank affirmed a judgment for $46,000.00 damages and $1836.00 maintenance and cure where a seaman, suffering from delirium tremens "caused by severe alcoholic intoxication while at Venice" on shore leave, fell through a hatch when the carpenter, who was attending him, thought he was asleep and left him unattended for five minutes while the carpenter went fifteen feet away to a lavatory.

In the light of these cases, the decision herein must mean that appreciation for the aesthetic is to be outlawed for a seaman, on shore leave or on ship, and that, unless he is to lose his maintenance and cure right by mere momentary lack of considered carefulness, he must forego interest in natural beauty and indulge instead in drunkenness, brawling, reckless diving into near empty pools, shooting of sea lions and the like. This, despite the steadily pursued national policy to promote the cultural advancement as well as the welfare of seamen.

Otherwise, it must mean that all these decisions and *Aguilar* as well, are to be overruled, and the Convention rendered meaningless, through importing into the law of maintenance and cure a Vermont statutory theory of "gross negligence", destroying completely the simplicity of maintenance and cure, with resulting litigation or forfeiture of every maintenance and cure claim.

POINT III

The Court erred in holding that recovery should be denied because to grant maintenance and cure would make the ship an insurer of the seaman's safety.

In thus ruling, the Court confused the rule applicable to indemnity but not maintenance and cure, as shown by its own decision in *Muruaga* v. *United States*, C. C. A. 2, 172 F. 2d 318, 320-321. Maintenance and cure does not involve indemnity, relating to safety or its opposite, damage.

Maintenance and cure is, in fact, as held in *Smith* v. *United States*, C. C. A. 4, 167 F. 2d, 550, 552, a species of "job insurance." The District Court had made arguments equivalent to that of the Court of Appeals herein (*The Robert Jordan*, *Smith* v. *United States*, D. C. E. D. Va., 74 F. Supp. 275, 277). In a dissent in *U. S.* v. *Brooks*, C. C. A. 4, 169 F. 2d 840, 848, Parker, *C. J.*, called maintenance and cure "a sort of accident and health insurance incident to the relationship." In a dissent in *Loverich* v. *Warner Co.*, C. C. A. 3, 118 F. 2d 690, 694, Clark, *C. J.*, said that it "is relational and provides a partial job insurance." The rights as expounded in the *Aguilar* and *Farrell* decisions represent practically insurance—not, indeed, of the seaman's safety, but of maintenance and cure.

CONCLUSION

The decision of the Court below involves questions of the greatest importance to seamen, upon which the Court of Appeals clearly erred; its decision is contrary to treaty, contrary to decisions of this Court and in conflict with decisions of other Circuits; and a writ of certiorari should be granted and the case should be reviewed and reversed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 87

WALTER K. WARREN,
Petitioner,

—against—

UNITED STATES OF AMERICA, as owner of the Steamship "ANNA HOWARD SHAW", *et al.,*
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

SAUL SPERLING
and
CHARLES A. ELLIS,
Proctors for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 87

WALTER K. WARREN,

Petitioner,

—against—

UNITED STATES OF AMERICA, as owner of the Steamship "ANNA HOWARD SHAW", *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The two opinions delivered in the District Court for the Southern District of New York (R. 97-109, 115-116) are published at 75 F. Supp. 210 and 76 F. Supp. 735. The three opinions delivered in the Court of Appeals for the Second Circuit (R. 137-141, 154-157) are published at 179 F. 2d 919-924.

The Writ and Jurisdiction

This Court granted a writ of certiorari herein October 9, 1950 (R. 158). The first decision of the Court of Appeals was rendered December 27, 1949 (R. 142). Petitioner made timely application for rehearing (R. 143-153), on which a majority opinion and order denying the application and a dissenting opinion were rendered March 2, 1950 (R. 154-158); and judgment was entered on the remittitur March 16, 1950 (the date mentioned in the Petition, p. 4). The Petition was filed May 24, 1950. The jurisdiction of this Court is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Summary Statement of Matter Involved

Petitioner, an American seaman, filed a libel in United States District Court for the Southern District of New York March 2, 1945 (R. 1, 3-6), against the United States, as owner, and American South African Line, Inc., as operator, of the S.S. ANNA HOWARD SHAW, in which maintenance and cure was claimed. Both respondents pleaded in defense petitioner's alleged gross negligence (R. 9, 14). The case was tried October 29 and 30, 1947, before District Judge Medina (R. 31-90). After conclusion of the trial the Court awarded $644.16 maintenance and cure and $36 costs against American South African Line, Inc., but dismissed as to the United States for alleged improper venue. American South African Line, Inc., appealed to the Court of Appeals, Second Circuit, and Petitioner cross appealed from dismissal as to the United States. Pending said appeals this Court decided *Fink* v. *Shepard S.S. Co.*, 337 U. S. 810, holding that under an operating contract such as involved here only the United States could be held liable. Petitioner thereupon stipulated for reversal as to American South African Line, Inc., but argued the appeal from dismissal as to the United States, claiming, under the circumstances, and under the record and findings, to which throughout the United States was party, the award made against South African Line, Inc., should be made against the United States under *Fink* v. *Shepard S. S. Co., supra.* The Court of Appeals (L. Hand, *C.J.*, Swan and Frank, *Js.*) held that the District Court erred in dismissing as to venue; but affirmed "on the merits" the dismissal as to the United States. In Petitioner's application for rehearing Petitioner stressed both the Court's error in failing to apply to the case the Shipowner's Liability (Sick and Injured Seaman) Convention, 1936 (54 Stat. 1693-1704), and its error under general maritime law—if the Convention were not applied—in holding Petitioner guilty of gross negligence and that such was a bar to maintenance and cure. The motion was decided apparently only as to the Convention, and a majority (Swan, *J.*, concurred in by L. Hand, *C.J.*) held that the Convention did not warrant changing their decision, with Frank, *J.*, dissenting on the ground that the liability provisions were self-operating, while the provisos permitting that national laws or regulations "may make exceptions" were inoperative to create exceptions in absence of legislation.

Material Facts

Respondents offered no evidence with respect to the happening of the accident and rested at the close of petitioner's case.

Petitioner was a messman in the steward's department of the S.S. ANNA HOWARD SHAW, on his first trip overseas, and had signed articles and joined the ship June 1, 1944 (R. 32). On October 30, 1944 the ship was in port near Naples, Italy, and petitioner went ashore on shore leave pass issued by the Captain (R. 33). Three men, the ship's carpenter, another messman and petitioner, walked about sightseeing for a time and then went into a dance hall, comparable to U. S. O. clubs, where American soldiers were entertained (R. 34-35, 65-66), five or six American soldiers being inside (R. 66), and outside which were a jeep and two American M. Ps., to whom he talked casually (R. 40, 65-66). People other than the Americans inside were well dressed and included one Italian woman schoolteacher who spoke English, and with whom he talked (R. 65), and a few others who could talk English (R. 81).

Petitioner enjoyed nature and scenery (R. 37). From one of the rooms large French doors were open onto a platform or ledge some three feet wide (R. 38, 68) and three or four sets of doors in length (R. 87), facing the sea and affording a beautiful view toward the Isle of Capri, and of the water hitting the stone below the platform and spraying (R. 66, 67, 37-8). He observed other people go over and onto the ledge and out to the edge and look, and so did he (R. 67, 88). He stood a few seconds, perhaps three to five minutes, before falling when a rod which he grasped gave way, and so surprised him that he lost his balance and fell (R. 68, 38). The rod did not extend to the floor, but appeared to be a hand-hold to hold on to (R. 70). He was thinking about the scenery out across the bay (R. 88, 68, 204). He "somehow or other" took hold of the rod, and as he did so and looked out a bit to see better the view, the rod let loose; surprised, he did not have time to recover himself, and fell below to his injury (R. 38-39).

He sustained a fracture of the distal end of the right tibia and fibula resulting in an osteomyelitis, which required the performing of an open reduction and which hospitalized him from October 30, 1944 to November 17, 1944 (R. 40) and from December 8, 1944 to December 21, 1944 (R. 43) and from February 27, 1945 to May 28, 1945 (R. 48) and which disabled him to July 1, 1945 (R. 55). His expenses were proven as basis for the award (R. 43, 46-47, 48, 49, 51, 54, 55).

Assignments of Error

The Court of Appeals, Second Circuit, erred

1. In holding that the decision of this maintenance and cure case is not affected by the terms of the Convention.

2. In holding that "shall be liable" provisions and "may make exceptions" provisions of the Convention are equally inoperative or equally self-operative, without legislation.

3. In not holding that clauses 1 of Articles 2 and 4 of the Convention are self-operative, and clause 2 of Article 2 inoperative, without legislation or regulations thereunder.

4. In not holding that Petitioner is entitled to maintenance and cure, under Clause 1 of Article 2 of the Convention, because his injury occurred "between the date specified in the articles of agreement for reporting for duty and the termination of the engagement."

5. In holding that negligence of Petitioner barred his claim for maintenance and cure.

6. In holding that Petitioner was guilty of "gross negligence" which barred his claim for maintenance and cure.

7. In holding that a seaman's right to maintenance and cure depends upon his "degree of care" or "degree of negligence."

8. In applying in a maintenance and cure case an unrelated States statutory concept of "degrees of negligence."

9. In failing to hold that (i) the words "wilful act, default or misbehavior" in Clause 2 (b) of Article 2 of the

Convention, and (ii) the general maritime law, do not allow as a defense to maintenance and cure "gross negligence" as interpreted by the Court of Appeals.

10. In holding that Petitioner is not entitled to maintenance and cure because to allow it would make the ship an insurer of his safety.

The Convention (Treaty) Provisions Involved

The treaty involved is the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693-1704. The specific provisions to be construed and applied are the provisions of Clauses 1 and 2 of Article 2, and Clauses 1, 2 and 3 of Article 4, as follows:

"ARTICLE 2.

"1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

"2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

"ARTICLE 4

"1. The shipowner shall be liable to defray the expenses of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

"2. Provided that national laws or regulations may limit the liability * * * to a period * * * not * * * less than sixteen weeks * * *.

"3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(a) that a shipowner shall cease to be liable * * * from the time at which that person becomes entitled to medical benefits under the * * * scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the * * * schemes, even when * * * not covered by the scheme in question, unless he is excluded from the scheme by * * * restriction which affects particularly foreign workers * * *."

Summary of Argument

Manifesty, either (1) the liability clauses are self-executing and the provisos permitting national laws to "make exceptions" are not, but leave "exceptions" to be made by legislation; or (2) both the liability clauses and the clauses permitting exceptions are self-executing; or (3) neither are self-executing, the Convention is without effect and the case governed by pre-Convention general maritime law. The decision below toys with all but decides none of the three. It alternately assumes or verbally expresses (2) and (3) and verbally denies (1); but in reality resorts to (1) by employing an assumed *judicial* power to "make exceptions" which Congress deliberately refused or omitted to make.

It defines "national laws or regulations" to include "decisional law," and appears to define the latter as including pre-Convention "decisional law." But in both it ignores the words "may make exceptions." The notion that pre-Convention decisional law may make exceptions involves the paradox of pre-Convention Judges carving exceptions out of treaty provisions more than fifty years before the treaty itself was made. The result that the March 2, 1950 decision itself makes the exceptions involves the paradox that one Court of Appeals can "make" exceptions which for eleven years Congress and other Courts have not made.

The majority decision treats the Convention as a riddle, whose meaning is to be sought by guess or speculation, forgetting that treaties are the subject of careful consideration and are made by experts "competent to express their meaning and to choose apt words in which to embody the purpose of the high contracting parties" (*Rocca* v. *Thompson*, 223 U. S. 317, 332).

We submit that in this most carefully drawn Convention, whose language is masterfully simple and plain, the liability provisions are statute-like and as positive and effective as a statute could have made or now could make them: but that the provisions permitting that national laws "may make exceptions"—even as the provision permitting that any nation "may denounce" the treaty at ten year intervals—are contractual provisions, completely executory and subject to legislative discretion to make or omit to make exceptions within the field marked out. They involve important competitive national policy, equally present in either the making or omitting to make exceptions. Congress has omitted to make any exceptions and the liability provisions control *sans* exceptions.

If, nevertheless, the clauses permitting exceptions either were self-executing or permitted Courts to determine the national policy and "make" the exceptions permitted, the exception clause relied on is confined to "wilful" wrongs of the injured man and permits no defense based on negligence. Petitioner was guilty only of negligence.

If, moreover, the treaty were wholly ineffective, the general maritime law would control: and it allows no defense based on negligence, whether with or without the epithet "gross".

We submit also that the Court should clarify the error of the Court below in employing against rather than in Petitioner's favor the shipowners' shibboleth that liability involves insurance.

POINT I

The liability provisions are positive, self-implemented and self-operative, creating enforceable liabilities as positively as would like provisions of a statute, and supersede pre-convention decisional law.

1. The liability provisions of the Convention are self-implementing and complete, and prescribe in positive form, within the Convention, every element of liability.

They include comprehensive, plain and positive provisions that "This Convention applies" to all persons employed on board any vessel, other than a ship of war (Art. 1, Cl. 1); that "The shipowner shall be liable in respect of * * * injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement" (Art. 2, Cl. 1); and five clauses fully and positively implementing such general liability with four specific liabilities, covering: medical care and maintenance (Art. 3 and Art. 4, Cl. 1); wages (Art. 5, Cl. 1); expense of repatriation (Art. 6); and burial expenses (Art. 7, Cl. 1). The Convention provides in each case that "The shipowner *shall be liable*" to defray or pay the same. (Compare as to the fifth subject of liability Art. 8, which provides that "National laws or regulations shall require" the shipowner to safeguard property).

2. These liability provisions are as fully self-implemented and complete as those in Part IV of the British *Merchant Shipping Act, 1906*, L. R. 6 & 7 Edw. Ch. 48, Part IV, §§28-49, pp. 257-270.* They are implemented, moreover, with as

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* The English statute deals, in different order, with substantially the same liability subjects as the Convention, viz., wages and effects of a seaman left behind (Sections 28, 37-39); property of a seaman dying (Section 29);

fully defined liabilities as ever recognized or provided by the general maritime law, as heretofore enforced in our Courts, or by the ancient codes out of which the general maritime law developed.

3. The provision in Art. 2, Cl. 1 for liability in respect of "injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement" was intentionally and carefully devised and adopted, with the specific object of having it embrace all injuries whatsoever, howsoever and wheresoever occurring within this "period of protection". (See discussion of "The period of protection" and "Risks Covered" in *First Discussion* report, *International Labour Conference*, 13th Sess., Geneva, 1929, "*The Protection of Seamen*" etc., *Second Item on the Agenda*, pp. 34, 209, 239; Record of Proceedings, *International Labour Conference*, 13th Sess., Geneva, 1929, p. 362; *Questionnaire II, International Labour Conference*, 13th Sess., "*The Protection of Seamen*" etc., *Second Item on the Agenda*, pp. 12, 26, 64; *Second Discussion—Report II, International Labour Conference*, "*The Protection of Seamen*" etc., *Second Item on the Agenda*, Geneva, 1931, pp. 29, 120, 161; *Record of Proceedings, International Labour Conference*, 21st and 22nd Sess., Geneva, 1936, p. 250; and discussion of the implementing provisions (Art. 4, Cl. 1; Art. 5, Cl. 1; Arts. 6, 7) collectively as providing the "Benefits," or "Benefits, and ship-

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repatriation (Sections 32, 45-47); maintenance and cure, repatriation, burial, temporary removal (Sections 34-35); maintenance of distressed seamen (Sections 40-42, 48). The provisions of Sections 34-35 are most nearly analogous to the Convention provisions here involved. Each provision deals, like the Convention, with the shipowner's liability to defray the expense involved, with no attempt to fix arbitrary amounts, nor arbitrary minimum or maximum limits. The English Act, however, specifically makes certain exceptions, in contrast to providing that national laws or regulations "may make" exceptions "in respect of" stated subject matters.

owner's liability" in *First Discussion* report, *supra*, pp. 47-85, 211-220; *Record of Proceedings*, 13th Sess., *supra*, pp. 363-370; *Questionnaire*, *supra*, pp. 14-23, 27, ~~64~~-67; *Second Discussion—Report II*, *supra*, pp. 44-49, 129-153.)

The *First Discussion* report, *International Labour Conference*, 13th Sess., 1929, *supra*, discussed the varying past national definitions of the limits of the period of protection (*Id.*, pp. 34-37); the risks covered and their relationship to the service (*Id.*, pp. 41-45), and pointed out that "The extent of shipowners' obligations toward seamen may differ considerably according as they cover *all* injuries and all illness *occurring during the period of protection*, or, on the contrary, as their obligation is confined to injuries and illnesses resulting from the service of the ship" (*Id.*, p. 37; italics ours).

Respecting "the seaman ashore on authorized leave", it stated that "account must be taken of the facts that it is in virtue of his agreement that a seaman undertakes a voyage, that he goes ashore on leave in various ports, * * * and that even certain faults and excesses may be explained, if not excused, by the constraint resulting from life on board ship" (*Id.*, p. 40).

Respecting the notion of fault it noted that, as to seamen, as yet, "There are few laws which do not introduce the notion of fault", but suggested "that it seems that the rights of the seamen should not be subject to any restriction" (*Id.*, p. 42).

In its Conclusion it stated: "Although it is a nice task to choose the appropriate terms, it may be suggested that the international regulations *should lay down that the period of protection should be such as to ~~cover~~ all sickness, injury, death occurring from the time of entry into service* *until the time of leaving the ship at the port of engagement* * * *" (*Id.*, p. 210; italics ours).*

The Convention represents the ultimate adoption of this view, with a compromise of adding separated clauses containing provisos agreeing that each nation acting unilaterally might make limited exceptions.

4. The liability provisions, moreover, are as positive and plain as any statute could make them. The words of Art. 1, Cl. 1 that "This Convention applies" are equally or more positive than the words "shall apply" used throughout our "Shipping" Code, 46 U. S. C. §§161, 188, 526q, 544, 570, 593, 597, 598, 599(e), 601, 688, 690, 709, 803, 845b, 1119b, 1128d, 1155a (a), 1312, 1314.

The specification in Art. 1, Cl. 1, of the persons to whom the Convention "applies," as "all persons employed on board any vessel, other than a ship of war * * * and ordinarily engaged in maritime navigation" conforms to the definition of "seaman" repeatedly found in our statutes, *i.e.*, "Shipping," 46 U. S. C. §713; "Aliens and Nationality," 8 U. S. C. §173; "Public Health and Welfare," 42 U. S. C. §201; "Emergency and War Shipping Acts," 50 App. (U. S. C.) §1291. Indeed, in the proceedings relating to drafting of this Convention, the definition in 46 U. S. C. §713 was referred to in *First Discussion* report, *International Labour Conference*, 13th Sess., *supra*, at page 18. Compare also *Tucker* v. *Alexandroff*, 183 U. S. 424, 444; *The Ida G. Farren*, D. C. E. D. N. Y., 127 Fed. 766; *Weaver* v. *Pittsburgh Steamship Co.*, C. C. A. 6, 153 F. 2d 597, 600, cert. denied 328 U. S. 858. Just as in the statutes and decisions cited, the Convention employs a purely contractual relationship designation; and its provision that the Convention "applies" to those designated leaves nothing to be added by legislation.

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* Note that Respondent's plaint in its Brief in opposition to the Petition (p. 3, footnote 2) that "in most cases" the shipowner has available only such evidence as he can wring from the seaman, itself refutes the lower Court's argument that literal interpretation of the Convention "would benefit only seamen who are least deserving of protection" (179 F. 2d 923). The very plaint voiced claims an inability, and shows an indisposition, to distinguish between "deserving" and undeserving; the course followed being instead to treat all as suspect, and all to be contested and even litigated. The Convention, in simply reversing this to have none contested, benefits most of all the suffering thousands with honest claims, but who the claim adjuster insists he has no reason to believe are different from the "least deserving." Contrary to the spirit of Art. 9 "for securing the rapid and inexpensive settlement of disputes," the shipowner rather would have the privilege of contesting, whether with or without cause, every claim presented, until the highest Court determines each case of liability.

5. The words "shall be liable" used in Clauses 1 of Arts. 2, 4, 5, 6 and 7 are precisely the same words, used with precisely the same meaning and effect, in *Lord Campbell's Act* of August 26, 1846, L. R. 9 & 10 Victoria Ch. 93, §1, p. 531; in the *Act of March 30, 1852*, §30, 10 Stat. 72 and *Act of February 28, 1871*, c. 100, §43, 16 Stat. 453, formerly R. S. §4493 and now 46 U. S. C. §491, covering "Liability of master and owners for damage to passengers," interpreted in *Sherlock* v. *Alling*, 93 U. S. 99, 105-106; and in the *Federal Employers Liability Act* of April 22, 1908, Ch. 149, §§1 and 2, 35 Stat. 65, now 45 U. S. C. §§51, 52 which is the principal statute incorporated by the words "shall apply" in §33 of the *Jones Act* of June 5, 1920, c. 250, §33, 41 Stat. 1007, now 46 U. S. C. §688.

They are the same words "shall be liable" used also in 46 U. S. C. §183, par. (d), and throughout the Shipping Code, 46 U. S. C. §§22, 23, 30, 32, 37, 38, 40, 46, 60, 62, 85g, 88g, 91, 101, 103, 142, 152, 153, 155, 156, 158, 159, 170(16), 175, 181, 182, 186, 194, 203, 222, 224, 224a, 229b, 265, 267, 277, 278, 287, 288, 295, 297, 299, 301, 304, 309, 312, 315, 316, 319, 321, 322, 323, 324, 334, 352, 355, 402, 436, 452, 457, 461, 465, 466, 492, 495, 497, 526o, 532.

They are used also in the *Longshoremen's and Harbor Workers Compensation Act* of March 4, 1927, c. 509, §4, 44 Stat. 1426, 33 U. S. C. §904: in the New York *Workmen's Compensation Law,* 64 McKinney's Consolidated Laws, Part 1, §10, as amended by L. 1947, c. 794, §6; in the British *Workmen's Compensation Act, 1906,* L. R. 6 & 7 Edw. c. 58, §§1 and 4, pp. 326 and 329, and in *Workmen's Compensation Act, 1925,* L. R. 15 & 16 Geo. 5, 1925, Stat. c. 84, pp. 1622, 1623, 1626.

Respecting Section 16 (b) of the *Fair Labor Standards Act* of June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S. C. §216(b), where the same words "shall be liable" are used, and where the word "wilful" used in (a) did not appear in (b), this Court in *Overnight Motor Transportation Co.* v. *Missel,* 316 U. S. 572, 581-582, affg. *Missel* v. *Overnight Motor Transportation Co.,* C. C. A. 4, 126 F. 2d 98, 110-111, approved a holding that the provision "was mandatory on the Courts" (316 U. S. 581).

6. Similarly worded, though less positive, provisions of treaties have been held self operative. In *Geoffrey* v. *Riggs,* 133 U. S. 258, this Court held to be self-executing treaty provisions that citizens of each country "shall be at liberty to dispose" of property; "shall be able to succeed" to property (Treaty of 1800), and "shall be free to dispose" of property (Treaty of 1853). In *Santovincenzo* v. *Egan,* 284 U. S. 30, 35-36, this Court held to be self-executing treaty provisions that in case of death of a citizen of one country in the other country his effects "shall be delivered up" to the Consul or Agent.

The provisions of the Warsaw Convention have been held self-executing, *Garcia* v. *Pan American Airways,* 269

App. Div. (N. Y.) 287, affg. 183 Misc. 258, and affd. 295 N. Y. 852, motion denied 295 N. Y. 981, cert denied 329 U. S. 741; *Wyman* v. *Pan American Airways*, 181 Misc. 963, affd. 267 App. Div. 947, appeal denied 267 App. Div. 983, affd. 293 N. Y. 878 cert. denied 324 U. S. 882; *Indemnity Insurance Co. of North America* v. *Pan American Airways*, D. C. S. D. N. Y., 58 F. Supp. 338. In the *Garcia* case the Appellate Division cited this Court's decision in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 41, 42, which involved the Convention here involved.

Even the Court below, with Judges L. Hand, Swan and Chase sitting, and Judge Swan writing the opinion, held in *Warschauer* v. *Lloyd Sabaudo S. A.*, CCA 2, 71 F. 2d 146, 148, cert. denied 293 U. S. 610, that a treaty provision that "The owner of the vessel incurs no liability" was a declaration which "needs no 'implementation' by legislation" and was binding on the Court.

7. In short, the Convention here involved uses, throughout the liability provisions, statute-like language, to which, under our Constitutional system, nothing need be added to make it enforceable. For, whereas in some countries, for example, England, treaties normally are merely a Crown contract and not considered law of the land unless enacted into law by Act of Parliament (*United States* v. *Rauscher*, 119 U. S. 407, 417), so that "the consent of the authority or authorities within whose competence the matter lies" required by International Labor Organization Constitution Arts. 19, 20, might include Parliament; a treaty here, once ratified by and with the advice and consent of the Senate (United States Constitution, Art. II, Sec. 2, Cl. 2), is "the supreme law of the land" (*Id.*, Art. VI, Cl. 2; *United States* v. *Rauscher*, *supra*, 119 U. S. pp. 417-419). Hence, the registration on October 29, 1938, of our national ratification complied fully with the pro-

visions of the International Labor Organization Constitution, with the Convention, and with our national Constitution, and made the Convention operative, according to its terms, from one year later, October 29, 1939, as law of the land (See President's *Proclamation*, 54 Stat. Pt. 2, p. 1704; *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 42). The Court, accordingly, should resort to its provisions for the rule of decision "as it would to a statute" (*Head Money Cases*, 112 U. S. 580, 598-599; *United States* v. *Rauscher*, *supra*, 119 U. S. at 418-419).

8. The statute-like, codifying character of the liability provisions is confirmed by the final language of Article 9 concerning "settlement of disputes concerning the liability of the shipowner *under this Convention*"; Article 11 concerning interpretation of laws or regulations relating to "benefits *under this Convention*"; and savings clause Article 12 saving only any law, award, custom or agreement "which ensures more favourable conditions than those provided *by this Convention*". (Italics ours). The very purpose of adding Article 12, over the objection that it was unnecessary, was to complete it as a self-sufficient code (See discussion, *Record of Proceedings, International Labour Conference, 21st and 22nd Sess.*, 1936, pp. 82-83).

Moreover, the last vestige of any language of the proposed liability provisions having any contractual or executory, as distinct from statute-like quality, was removed when the originally proposed Article 1 (*Id.*, p. 244) was eliminated (*Id.*, p. 248), and then the liability provisions themselves were revised to the "shall be liable" form, and Articles 9 and 11 revised and Article 12 added as above noted.

9. Had these same liability provisions been made by national codifying statute, instead of by codifying treaty,

there could be no question of their stature, as complete in themselves, so as to supersede prior law on the subject (Cf. *Murdock* v. *City of Memphis*, 20 Wall [87 U. S.] 590, 617; *United States* v. *Tynen*, 11 Wall [78 U. S.] 88, 92; *District of Columbia* v. *Hutton*, 143 U. S. 18, 27; *Hamilton* v. *Rathbone*, 175 U. S. 414, 421). Prior to the Convention we had no statutory laws covering the same subject; and the treaty-making power, by the Convention, "took possession of the field" of shipowners' liability to seamen on the subjects covered, just as effectively as the Employers Liability Act "took possession of the field" of railway liabilities, with pre-Convention law equally "superceded" (Cf. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 501).

10. Had they been adopted as Uniform Laws, by legislative acts of the different countries, there could be no question that the very purpose of uniformity would require that we look to them, rather than to pre-Convention concepts in any one State, for the rule of decision. (Cf. *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Co.*, 239 U. S. 520, 528-529; *Interstate Banking & Trust Co.* v. *Brown*, CCA 6, 235 Fed. 32, 36, cert. denied 242 U. S. 632; *Giles* v. *Vette*, 263 U. S. 553, 564, affg. *In re Marcuse & Co.*, CCA 7, 281 Fed. 928, 940; *Austin Nichols & Co.* v. *Gross*, 98 Conn. 782; *Harris* v. *Esterbrook*, 55 S. D. 538, 70 A. L. R. 241; *Fidelity & Casualty Co. of N. Y.* v. *Plananscheck*, 200 Wisc. 304, 71 A. L. R. 331).

11. They have, however, been codified by Convention rather than by legislation for the very purpose of further establishing uniformity than could be done by attempting a degree of uniformity by legislation. This is the fundamental and significant distinction between respectively "Recommendations" and "Conventions" under the *Consti-*

tution of the International Labour Organization, Art. 19. (Compare *Constitution and By-Laws of the National Conference of Commissioners on Uniform State Laws*, Art. VIII, which provides only for "recommendation").

From 1920 to 1936, there were four special maritime or "Seamen's Conference" sessions, *viz.* the Second, Ninth, Thirteenth and Twenty-first Conferences, in respectively 1920, 1926, 1929 and 1936. At the Second Conference, 1920, Agenda Item IV was "The Possibility of Establishing an International Code for Seamen." The Conference adopted (See *Record of Proceedings, International Labour Conference*, 2d. Sess., p. 173) a Resolution (*Id.*, p. 594) requesting the International Labour Office to make investigations necessary for establishing an international seamen's code (See also Commission report, Appendix V, *Id.*, pp. 547-566, and debate, *Id.*, pp. 162-183; *Report IV, Seamen's Conference, International Labour Office*, June, 1920, pp. 62, 155, 159).

In 1921 the International Labour Office published a volume "The International Seamen's Code," discussing the same subjects, pp. 5, 9, 33-37, and urging "codifying and uniformising the law" (*Id.*, p. 36).

Following the Ninth (Second Seamen's) Session of the Conference, the International Labour Office in 1927 published "The International Labour Organization and the Seaman," containing at pp. 10 et seq. a discussion advocating "An 'International Seamen's Code'," reiterating and amplifying the 1921 views and stating it would be "entirely possible for an international Code to be established."

The 1929 First Discussion report stated that "Thus it would seem that the international regulations might *impose obligations* on shipowners in case of sickness or injury which necessitates medical aid or causes incapacity for work" (*First Discussion report, supra*, p. 209; italics ours). The 1929 Conference adopted a preamble definitely stating that "the individual liability of the shipowner towards sick or injured seamen could be made the subject of a Draft Convention" (*Record of Proceedings, International Labour Conference, 13th Sess.; supra,* p. 371). This was over the shipowners' protest that a Recommendation would be preferable because a Convention would "override differences in national systems" (*Id.,* p. 377). The Conference rejected the idea that "the development of the shipowner's liability * * * should be left to the free play of forces within national legislation" (*Id.,* p. 131).

From that time forward, it was a matter of working out what liabilities should be positively imposed, and what liberties should be permitted to the separate countries to make unilateral modifications.

When the Convention was under consideration for ratification by our Government, the Secretary of State, by letter to the President dated August 18, 1937, stated that the reason for attainment of its objectives of greater protection for seamen by international agreement was that the failure of any nation to adopt humane conditions "is an obstacle in the way of other nations" and stressed the "competitive" effect (*H. R. Report No. 1328, 76th Cong. 1st Sess.,* p. 9).

For greater reasons, therefore, than apply to our Uniform State Laws, these statute-like liability provisions of the Convention "should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the [countries ratifying] it", lest we "miss the desired uniformity and * * * erect upon the foundations of uniform language separate legal structures as distinct as were the former varying laws" (Cf. *Commercial National Bank of New Orleans v. Canal-Louisiana Bank & Trust Co., supra,* 239 U. S. 520, 528-529).

12. Because made primarily for the protection and benefit of seamen, they are to be liberally construed to carry out such purposes (*Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 248; *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431; *Warner* v. *Goltra*, 293 U. S. 155, 156, 162; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Jamison* v. *Encarnacion*, 281 U. S. 635, 640). Moreover, as treaty provisions they are to be liberally construed to accomplish its full purposes (*Baccardi Corp.* v. *Domeneck*, 311 U. S. 150, 163; *Asakura* v. *Seattle*, 265 U. S. 332, 342; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487).

13. As noted in the Petition, and supporting Brief, the Secretary of State very aptly pointed out that, as to these statute-like liability provisions, "there would appear to be no need to repeat verbatim the language of the Convention in a statute to make it effective" (*H. R. Report, 1328*; 76th Congress 1st Sess., p. 6). Manifestly, as to the liability provisions, in contrast to the contractual provisions respecting permitted exceptions, all that a statute could do without violation of the Convention would be to "repeat verbatim" the Convention langauge. This would be like repeating verbatim another Act of Congress, since both equally are "supreme law of the land" (United States Constitution, Art. VI, Cl. 2).

POINT II

By contrast, the provisions permitting exceptions are contractual in nature, and establish no exceptions in absence of national legislation to "make exceptions."

14. For the very reason that the liability provisions are positive, other provisions were inserted to permit limited national modifications, without entailing violation of the Convention.

Such are the permissive provisions that national laws or regulations "may make exceptions" (Art. 1, Cl. 2; Art. 2, Cl. 2); "may provide" for nonliability for concealed sickness (Art. 2, Cl. 3); "may limit" liability to minimum periods (Art. 4, Cl. 2; Art. 5, Cl. 2); "may provide" for liability to "cease" in cases of available insurance or workmen's compensation schemes (Art. 4, Cl. 3(a), and (b); Art. 5, Cl. 3(a) and (b)); "may provide" for insurance reimbursement of burial expense (Art. 7, Cl. 2); the provision that the shipowner "may be exempted" from liability under Articles 4, 6 and 7, insofar as such liability is assumed by the public authorities (Art. 10); and the provisions that any member "may denounce" the Convention after any ten year interval (Art. 17).

15. In contrast to the statute-like liability provisions, these permissive provisions use "the language of contract" (*Foster and Elam* v. *Neilson*, 2 Pet. [27 U. S.] 253, 314-315).

The word "may" is common to them all, in contrast to the words "shall be liable" used in the liability provisions.

But "may" is a word of permission, consent or authorization (*Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579, 587, 588; *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 662-663; *Interstate Com-*

merce Commission v. *Inland Waterways Corp.*, 319 U. S. 671, 689; *Anderson* v. *Yungkau*, 329 U. S. 482, 485; *United States ex rel. Siegel* v. *Thoman*, 156 U. S. 353, 360; *Thompson* v. *Lessee of Carroll*, 22 How [63 U. S.] 422, 434; *Levers* v. *Anderson*, 326 U. S. 219, 223; *The Mary N. Hogan*, D. C. S. D. N. Y., Brown, *J.*, 17 Fed. 813, 814).

In the *Terre Haute* case a statutory charter provided that the legislature "may so regulate the tolls and freights" that not exceeding 15% be divided on capital, with any surplus payable to the State. Reversing a judgment for the State, this Court, by Holmes, *J.*, said "The language is plain" and operated to "leave the rights of the State in abeyance until a future legislature should choose to act" (194 U. S. 587). It pointed out that, after the charter was enacted "Circumstances might change, and knowledge might change" (194 U. S. 588), and the provision simply made the charter "subject to the power of the State in certain events to require it to pay over extra profits" (194 U. S. 589).

16. Apparently the provisions permitting that national laws or regulations "may provide" for dove-tailing the Convention liabilities with insurance or workman's compensation schemes of any "territory" of registry were primarily in the seaman's interest. See Committee Chairman Grieser's statement, "he may be covered by a system of sickness insurance and the benefits which may be granted by an insurance system exceed those which could be granted by the individual liability of the shipowner" (*Record, International Labour Conference*, 13th Sess., 1929, p. 131). The system itself, however, might be applicable in terms only after care and maintenance liability ceased. (Cf. *Anchor Line [Henderson Brothers] Ltd.* v. *Mohad*, L. R. [1922], 1 A. C. 146, 153, 155, 157; *English Workmen's Compensation Act, 1906*, c. 58, §7(e), L. R. 6 & 7

Edw. 325, 331). Hence, the proviso that *national* laws or regulations "may provide" the "cease" element required by any such "territory" scheme, rather than have the seaman do so by deserting, as did *Mohad.*

Note that an amendment which would have provided for a country, having sickness insurance and workmen's compensation, with shipowner's liability until repatriation, "to be deemed to comply with the requirements" of this Article was rejected (*Record, International Labour Conference*, 21st & 22nd Sess., 1936, pp. 252-253). "The general rule was laid down in paragraph 1, while paragraphs 2 and 3 provided for the *possibility* of alternative limitations in certain cases" (*Id.*, p. 251). "The first paragraph *made* the duration of liability depend on the seaman's condition: the second paragraph *permitted* a time limit of 16 weeks to be applied, and the third paragraph *permitted* termination of liability where benefits were provided for under a system of sickness insurance, accident insurance or workmen's compensation" (*Id.*, p. 252). "Meanwhile it was necessary to procure a *certain* measure of protection" (*Id.*, p. 253; italics ours).

17. By the "may limit" the period of liability provisions the Convention—after fixing duration of assistance by duration of treatment necessitated for cure; a principle "indisputable from the social standpoint"—merely "*leaves it open* to national laws or regulations to fix the period on the expiry of which the liability of the shipowner shall cease" (*Second Discussion—Report II*, International Labour Office, 1931, p. 162) after a period "not less than" stated in the permitting proviso (*Id.*, p. 163) Note also, "It should be *left to national legislation*, however, to provide" for termination of wages at expiry of a minimum period (*Id.*, pp. 142-143); "*leaving it open* to national laws or regulations" to fix such period of expiry (*Id.*, pp. 164-

165). The 1929 *First Discussion* report had suggested "a provision *leaving the national laws the power*" to fix such a period (*First Discussion* report, *International Labour Office*, 1929, p. 217). Cf. also pp. 226, 227, 236, speaking of allowing national laws the "faculty" of making certain exceptions under companion Convention. (Italics ours.)

18. How plainly executory and permissive are the optional modifications allowed under Article 2, and the importance of this, are shown by its discussion (as then numbered Article 3) at the 1936 Conference (*Record, International Labour Conference*, 21st & 22nd Sess., 1936, pp. 249-251). An amendment to add paragraph 3 would have had it read that "The liability of the shipowner shall not apply" where medical examination had been refused. On first vote, the amendment was adopted 22-21: a one vote margin. It was immediately reconsidered, referred to a subcommittee, revised to read that "*National Laws or regulations may provide that* the liability of the shipowner shall not apply," etc.; and then was adopted 37-0 (*Id.*, pp. 250-251; italics ours).

In Paragraph 2(a) "The office text *authorized* Members *to make* an exception in respect of: (a) injury incurred otherwise than in the service of the ship." An amendment to add "sickness," so as "*to enable* national laws to apply restrictions in case of sickness" equally with injury, was rejected. The effect of paragraph 2(b) was that "*Members were authorized to make* exceptions in respect of" injury or sickness due to wilful misconduct or sickness intentionally concealed (*Id.*, p. 250).

They were reported to the Conference as "a list of exemptions which *may be made* by national laws and which are specified in the draft" (*Id.*, p. 73) (Italics ours). The *Second Discussion—Report II* had proposed that "the Draft Convention should *permit* national laws to provide an exception" (*Second Discussion—Report II, International Labour Office*, *1931*, p. 117) and "allow national laws to provide an exception" in specified cases (*Id.*, p. 128), stating that "It is with some regret" than the Office included the clause that "National Laws or regulations may make an exception in respect of injury incurred otherwise than in the service of the ship" (*Id.*, p. 164).

At one point, the conclusions hypothesized "*Even if national law were to make use of all* the *possible* exceptions" (*Id.*, p. 160).

19. It has been said that "Making involves causality—the production of an effect by a cause * * * And the causing * * * involves the idea that it is without previous existence" (*In re I. Rheinstrom & Sons Co.*, D. C. E. D. Ky., Cochran, D. J. 207 Fed. 119, 151, 152, affd. CCA 6, 221 Fed. 829, app. dismissed 239 U. S. 11). Particularly is this true when what one is to "make" are "exceptions" by or pursuant to a proviso or other separated clause. The use here of the word "exceptions" negatives the idea of a savings clause saving pre-Convention defenses (which, moreover, were not formulated with reference to the Convention liabilities); for it necessarily has post reference to the treaty made liabilities. Otherwise "some other word than 'exception' would have been used" (Cf. *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549).

Exceptions by or pursuant to provisos involve the principle of the carving knife; provisos either do or do not effectively "carve" some particular "special exceptions only out of the body" of the principal clause (*United States* v. *Dickson*, 15 Pet. [40 U. S.] 141, 165; *Ryan* v. *Carter*, 93 U. S. 78, 83, 84; *Columbia Insurance Co.* v. *Lawrence*, 10 Pet. [35 U. S.] 507, 518; See also *Schlemmer* v. *Buffalo Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U. S. 502, 507-508;

McKelvey v. *United States*, 260 U. S. 353, 356-357; *Interstate Commerce Comm.* v. *Baird*, 194 U. S. 25, 36, 37; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 377).

20. Here, the Convention in the provisos has used, not the carving knife, but the surveyor's pencil. It has merely marked out bounds within which Members "may", at their national option, "make exceptions."

Even these are left to definition or further limitation, within the limited field marked out, as shown by the words "in respect of." In *American Chicle Co.* v. *United States*, 316 U. S. 450, 453, this Court treated the statutory phrase "with respect to" as meaning "as relates to." The proviso in Art. 2, Cl. 2 thus allows an option to "make" one or more exceptions under (a) relating to injury occurring "otherwise than in the service of the ship," and under (b) relating to injury due to wilful act, default or misbehaviour. It may by national law "except" from the liability provisions some while not excepting others of either or both classes, or may "except" all, or may omit to "except" any.

How unwise it might prove for Congress to "make" broadly an exception, in the language of (a) appears by comparing, the "deceptively simple and litigiously prolific" (Cf. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 479) term "arising out of and in the course of employment" used in compensation laws.

To omit to make any exceptions would be in keeping both with the spirit in which the Convention was adopted, and with the policy which motivated our Government in ratifying it. But most significant here is the fact that Congress has omitted to make any exceptions.

21. Where there is "a condition subsequent embodied in a proviso", precisely that condition must be shown to have occurred, and it is "not enough" even to show that

something "called by the same name" exists (*Holmes, J.*, in *Javierre* v. *Central Altagracia, supra*, 217 U. S. at 507-508). Here the proviso is that "National laws or regulations may make exceptions in respect of." The majority below in reasoning that "decisional law" can be called by the same name "national laws or regulations", loses sight of the remaining words "may make exceptions in respect of". (Cf. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana, supra*, 194 U. S. 579, 587, 588).

It overlooks also that in Art. 2 Cl. 2 and every other instance where the English text uses the term, "national laws or regulations" the French text uses the term "législation nationale," whereas in the three instances where the English word "law" is used with reference to possibly existing law (Art. 4, Cl. 3(b); Art. 5, Cl. 3(b) and Art. 12) the French text uses "loi" (Cf. *United States* v. *Percheman*, 7 Pet. [32 U. S.] 51, 88-89, where, with the Spanish Text before it, the Court gave an oppositive interpretation to the same treaty interpreted from the English text alone in *Foster & Elam* v. *Nielson*, 2 Pet. [27 U. S.] 253, 314-315).

22. This Court has frequently held that the making of exceptions, additional exceptions, or qualifications to a law is a legislative function, and the Courts can not make nor add to them (*Maxwell* v. *Moore*, 22 How. [63 U. S.] 185, 191; *French* v. *Spencer*, 21 How [62 U. S.] 228, 238; *Yturbide* v. *United States*, 22 How. [63 U. S.] 290, 293; *Galloway* v. *Finley*, 12 Pet. [37 U. S.] 264, 299; *Leffingwell* v. *Warren*, 2 Bl. [67 U. S.] 599, 605; *Louisville* v. *Nashville R. R. Co.* v. *Motley*, 219 U. S. 467, 479; *Bank* v. *Sherman*, 101 U. S. 403, 406; *DeLima* v. *Bidwell*, 182 U. S. 1, 198; *Pirie* v. *Chicago Title & Trust Co.*, 182 U. S. 438, 451-452; *Sturges* v. *Crowinshield*, 4 Wheat. [17 U. S.] 122, 202-203). The Courts may not accomplish a different

meaning "by inverting the ordinary meaning of words" (*DeLima* v. *Bidwell, supra,* 182 U. S. p. 198).

23. The majority decision below would completely invert the arrangement and the language of the Convention, with paradoxical results.

If by "decisional law" the majority below mean pre-Convention decisions such as *Peterson* v. *The Chandos* (1880), D. C. Or., 6 Sawy. 544, 4 Fed. 645; *The J. F. Card* (1890), D. C. Mich., 43 Fed. 92; and *The Ben Flint* (1867), D. C. Wisc. 1 Abb (U. S.) 126, 1 Biss 562, 3 Fed. Cas. No. 1299, cited in the Courts first opinion (179 F. 2d. 921), we have the paradox of Courts making exceptions to a treaty over fifty years prior to its existence, and, of course, without considering its provisions. On the one hand, Courts cannot decide matters not before them; on the other hand, "exceptions" cannot be made to an instrument or clause before the instrument or clause itself exist.

If by "decisional law" the majority mean its current decision, we have the paradox of one of the ten Courts of Appeals—itself limited by the Constitution to the "judicial power" and the "case" before it (U. S. Constitution, Art. III, §2)—making on March 2, 1950, "exceptions" pursuant to national option under a treaty in effect since 1939, which heretofore had no judicial "exception" appended (*Smith* v. *United States,* CCA 4, 167 F. 2d 550, 552), and to which Congress deliberately omitted to "make exceptions". (Cf. *The Amiable Isabella,* 6 Wheat. [19 U. S.] 1, 73; *Muskrat* v. *United States,* 219 U. S. 346, 356, 361; *United States* v. *Ferreira,* 13 How. [54 U. S.] 40, 48-49).

In either case, one might as well say that pre-Convention Courts or Courts today may exercise the national authority to terminate the treaty under Article 17, as to say that such Courts "may make exceptions" permitted to the national policy.

24. Instead of the liability provisions being positive *sans* defenses, until a Member elect by legislation to "make exceptions," the *defenses* would be rendered positive *sans* equivalent liability until a member elect by legislation to *un*make exceptions and create liabilities.

Instead of all governments and shipowners being bound initially by uniform liability provisions *sans* exceptions, enabling each government from this vantage point to formulate its policy of whether to proceed alone in making exceptions—with due regard to the policy of others and the considered effect on them of its making or not making the exceptions permitted; this highly valuable uniform position would be destroyed and the competitive situation would be reverted to precisely what it was before the Convention.

If the legislative branch of this or any other Government should then think—as did the treaty-makers and Congress—that the benefits should be *sans* exceptions, it could not accomplish this by merely omitting to make exceptions but would act alone in providing increased benefits, with no similar effect of its action on the policy of others (Cf. Secretary Hull's statement of "The reason" for the Convention, *H. R. Report No. 1328*, 76th Cong., 1st Sess., p. 9; speeches of Chairman Fontaine, *Record International Labour Conference*, 13th Sess., 1929, p. 4; Grieser, *Id.*, p. 131; Hohman, *Record of International Labour Conf.* 21st and 22nd Sess., 1936, pp. 72-73).

The majority decision below would completely deprive Congress and the Government of the option to omit to "make exceptions." This tremendous reversal of national and international policy would be accomplished by judicial fiat of a single court of a single treaty adherent, destroying rather than applying the text of the Convention.

25. As noted in the Petition and supporting Brief the Secretary of State and other department heads, Commissions, and Boards repeatedly interpreted these provisions as merely permissive, so that "If this Government is to be excepted from certain obligations of the Convention or alterations in our present practice, it is necessary to do so affirmatively by statute" (*H. R. Report 1328, supra,* p. 6, *et seq.*).

This point was specifically made also by the Committee Chairman in House Hearings on H. R. 6881 (*Hearings, Committee on Merchant Marine and Fisheries, House of Representatives,* 76th Congress, 1st Sess. on H. R. 6726 and H. R. 6881, at p. 46); and by Senators White and Overton in Senate Committee hearings (*Hearings, Subcommittee of the Committee on Commerce,* United States Senate, 76th Cong. 3rd Sess. on H. R. 6881, at pp. 189, 303). It was applied in drafting H. R. 6881, which was passed by the House, but which died in the Senate when a Title II was added by the Senator who introduced it, to make seamen subject to Workmen's Compensation somewhat as had companion H. R. 6726, which the House Committee had dropped during the hearings (see the two Committee hearings, *supra*).

The point was specifically recognized by the President's Proclamation of the Convention "subject * * * to any exceptions and any limitations of liability in accordance with the provisions of the convention which may be made by legislation or regulations on the part of the United States of America" (54 Stat. 1704).

Under Article 1 of the companion *Officers Competency Certificates Convention,* similarly permitting exceptions as to vessels, the point was recognized and given application by Congress and the President in the enactment of the *Act of March 29th, 1939,* c. 26, 53 Stat. 554, now 46

U. S. C. §241, making by statute exceptions to such companion Convention, and the Presidential Proclamation of that Convention subject to those statutory exceptions (54 Stat. 1683, 1692). Reporting on the bill (H. R. 950) before its enactment, the House Committee, pointing out that the Convention was effective for 10 years, and then "If not denounced," it would be binding for 10 years more, said "This makes it important that exception be granted forthwith to all vessels which according to the terms of the treaty or convention may be exempted, and your Committee believes this should be an accomplished fact before October 29, 1939, when the Convention goes into effect * * * These vessels unless exempted as proposed in this bill would include vessels of 5 tons and over" (*H. R. Report No. 41, 76th Cong. 1st Sess.* p. 3). This report preceded *Report No. 1328* by the same Committee.

Compare also Arts. 1 of the two Conventions: Whereas the Liability Convention Art. 1, Cl. 1, by the words "other than a ship of war," excepts only ships of war, the Officers Competency Convention Art. 1, Cl. 1 itself excepted (a) ships of war, (b) government or public vessels and (c) wooden dhows and junks; Clause 2 in both cases providing that "National laws or regulations may" make further limited exceptions (54 Stat. 1684, 1694). Re materiality see V Hackworth's Digest of International Law, p. 229, citing World Court decision.

Congressional omission to make any exceptions under the Liability Convention indicates a national policy not to make exceptions; and the Court may not properly deprive Congress of this option.

26. The simple interpretation made by the President; by the Secretary of State and eight other heads of Departments, Commissions and Boards; by Chief Justice Stone in *Waterman Steamship Corp. v. Jones*, 318 U. S. 724, 738;

by the Fourth Circuit Court of Appeals in *Smith* v. *United States*, 167 F. 2d. 550, 552, and by dissenting Judge Frank herein (179 F. 2d. 923-924)—fully supported, we submit, by this Court's decisions in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 42 and *Farrell* v. *United States*, 336 U. S. 511, 517—is simply the plain meaning of the Convention's language, which those distinguished officials and jurists recognized needed no massing of "reasons" (*Swan, C.J.*, 179 F. 2d. 923) to support it. It is, nevertheless, supported by every step taken since inception in 1920 of the program for a "Seaman's Code" by Convention, until the decision of the majority below. That decision, unless reversed, and not the Convention, would "*create*" (Cf. *Hamilton* v. *Rathbone*, 175 U. S. 414, 419, 421) paradox and confusion, and thereby destroy this and other Conventions similarly worded.

POINT III

Even if the provisions permitting exceptions themselves established the exceptions, the clause relied on would not allow negligence as a defense, but would require that "wilful" misconduct be shown.

So also would the general maritime law, if the convention could be held wholly inoperative.

27. The *Second Discussion-Report II*, prepared after governments replied to the *Questionnaire* and submitted suggestions, states that "these various suggestions . . . appear to have one idea in common that has attracted the attention of nearly all Governments, and that is the idea of wilfulness. It is this factor of wilfulness that plays a decisive part in the definitions of inexcusable fault, serious fault, grave negligence, etc." (*Second Discussion—Report II, International Labour Office 1931, supra*, p. 128). "Owing

to the variety of definitions proposed, the formulation of the international text has been rather difficult. On the whole, it seems possible to obtain general support for the expression 'wilful misconduct,' because this is an average solution which moreover comprises the factor common to most of the expressions considered, i.e.; that of wilfulness" (*Id.*, pp. 161-162).

When the proposed clause was being considered by Committee at the 1936 Conference, one amendment proposed to substitute for "wilful misconduct" the words "act, default or misbehaviour"; another proposed to insert after the words "wilful misconduct" the words "or gross negligence." It was argued "that the shipowner ought not to be held liable for the consequences of the act or even for the negligence of the seaman. A Government member observed that he would be prepared to support the *first* of these amendments *if the word 'wilful' were maintained.*" The first amendment was altered to substitute "wilful act, default or misbehaviour" and adopted; the second was rejected (*Record of Proceedings, International Labour Conference, 21st & 22nd Sess., supra*, p. 250; italics ours). Compare French text of Art. 2, Cl. 2(b) (54 Stat. 1695).

The Court below erred, therefore, in holding petitioner barred, even if the clause were self-executing and if, as it said "the care which Warren took was very slight" and represented "gross negligence" (179 F. 2d. 922). Actually, he was intent upon viewing a beautiful scene, and was guilty at most of momentary lack of considered carefulness.

28. But wilfulness would be required under the general maritime law, even if the Convention were wholly inapplicable. The *Second Discussion—Report II*, as noted above, shows almost unanimity of the maritime world in requiring "wilfulness" under their pre-Convention maritime laws, whatever the term used in naming the defense." As

to our pre-Convention general maritime law decisions, and the errors below in their interpretation, reference is made to the Petition (pp. 11-15) and supporting Brief (pp. 25-35).

If the statutory rule under the Vermont automobile guest statute involved in *Moisan* v. *Loftus*, C. C. A. 2, 178 F. 2d. 148, cited below (179 F. 2d. 921), could be applied in the Second Circuit, then with equal authority the opposite rule under comparable automobile guest statutes of other States could be applied in other Circuits; and other States hold that "gross negligence" is a misnomer which, however, in such statutes means "wilful and wanton misconduct" (*Bushie* v. *Johnson*, 296 Mich. 8; *Keehn* v. *Braubach*, 307 Ill. App. 339; *Melby* v. *Anderson*, 64 S. D. 249; *Anderson* v. *Anderson*, 69 N. D. 229; *Orme* v. *Burr*, 157 Fla. 378; *Witdock* v. *Gyselbracht*, 67 Oh. App. 120; *Bruno* v. *Donahue*, 305 Mass. 30; *New Amsterdam Casualty Co.* v. *Jones*, C. C. A. 6, 135 F. 2d. 191; *Krueger* v. *Taylor*, C. A. D. C. 132 F. 2d. 732).

The term in Maritime decisions, however, is not the statutory term of any State. It was borrowed below from old District Court decisions allowing recoveries to injured seamen in which it clearly was used as synonymous or interchangeable with "positively vicious conduct" (*Peterson* v. *The Chandos*, 6 Sawy. 544, 4 Fed. 645; *The City of Carlisle*, 39 Fed. 807, 813); "vicious or unjustifiable conduct * * * operating in the nature of a fraud upon the owners" (*The Ben Flint*, 1 Abb. (U. S.) 126, 1 Biss 562, 3 Fed. Cas. No. 1299). Not these old decisions, but the Court below introduced the Vermont automobile guest statute concept. As pointed out in our Brief supporting the Petition, the only differences between the *Peterson* case and the case at bar are (1) that Peterson was at work, whereas Warren was on shore leave, and (2) Peterson was more negligent than Warren. *Aguilar* v. *Standard Oil Company*, 318 U. S.

724 removed (1) as a ground for distinction; moreover, the Convention and the learning embodied in the International Labour Office reports which influenced its adoption, confirms such as the proper holding under *general* maritime law, even were the Convention itself not "supreme law of the land." And (2) favors Petitioner.

We repeat, as in our prior Brief (p. 33), that *Peterson v. The Chandos* and the decision below cannot both be right. Indeed, claim adjusters already insist that this *Warren* decision below destroys such precedents as *Peterson*, overrules *Aguilar* and renders the Convention a new burden rather than boon to seamen.

As pointed out in the Petition (p. 14, par. 19) and supporting Brief (p. 29, par. 5), this Court has never held that "negligence," nor the epithetic "gross negligence," is a bar to maintenance and cure. It should not do so now.

POINT IV

The error in holding that recovery would make the shipowner an insurer of the seaman's safety. The importance of clarifying this.

As pointed out in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 93-97, even the shipowner's liability for unseaworthiness is one imposed "regardless of his fault," because "he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost" (p. 94; see also p. 96); "Not the owner's consent to liability, but his consent to performance of the service defines its boundary" (p. 96); "the liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent" (p. 97), as "the traditional securities afforded by the law of the sea to men who do the ship's work" (p. 100). The dissent by two Justices specifically stated that the decision established that "the owner is an insurer against injury caused by unseaworthiness" (p. 103) and represented "paid up accident insurance policies" (p. 107): and the dissent was mainly upon the ground, not that these rulings were wrong as to seamen, but that they were inapplicable to stevedores or longshoremen, saying: "The whole philosophy of liability without fault is that losses which are incidental to socially desirable conduct should be placed on those best able to bear them" (p. 108).

While liability for unseaworthiness involves damages, the maintenance and cure liability always has been one for maintenance of the sick and injured man and treatment to effect a cure.

A stock argument of shipowners' counsel in cases involving the liability, nevertheless, is that to allow recovery would make them insurers. It consistently has been shipowners' language rather than that of the seaman, who knows little of wordy distinctions. But, despite the fact that it means, in effect, that "To hold us liable would make us liable," it has been astonishingly successful in defeating recoveries before lower courts, as witness the decision below, and the District Court decision in *The Robert Jordan*. *Smith* v. *United States*, D. C. E. D. Va., 74 F. Supp. 275, 277, revd. *Smith* v. *United States*, C. C. A. 4, 167 F. 2d. 550, 552.

The Convention was designed to "ensure" more favorable conditions (Art. 12); and it seeks to promote "rapid and inexpensive settlement of disputes" (Art. 9). We submit that the Court should remove the dangers of this ever recurring shipowner shibboleth by frankly confirming that the liability, indeed, is one representing for practical purposes insurance, and that the cry that it constitutes insurance should no longer be accepted below to defeat recoveries but applied to sustain them, as the traditional principles of maintenance and cure decisions and the clear policy of the Convention require.

CONCLUSION

The judgment below should be reversed and the case remanded with directions to enter judgment for petitioner for $644.16 maintenance and cure and costs and disbursements in all courts.

Respectfully submitted,

Saul Sperling
and
Charles A. Ellis,
Proctors for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1950

No. 87

WALTER K. WARREN,
Petitioner,

—against—

UNITED STATES OF AMERICA, as Owner of the Steamship "ANNA HOWARD SHAW", *et al.*,
Respondent.

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S RESPONSE

SAUL SPERLING,
and
CHARLES A. ELLIS,
Proctors for Petitioner.

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I

1. The calculated sophistry, misrepresentation and hypocracy evident in the "AMICUS CURAE" brief, we believe, will shock the Court. Yet it is in substance, particularly as respects the Convention, the argument which was made below by or in name of the United States Attorney, through the same counsel as "of counsel" for the United States Attorney and the United States.

2. Perhaps the most shocking of their arguments is that respecting the Convention; that "If, as petitioner contends, the Convention is the supreme law of the land, by implication, it overrules the Jones Act (46 USCA

688) and Death on the High Seas Act (46 USCA 761)" (*Brief of the United States Lines Company, Amicus Curae*, p. 18), and "overrules the Longshoremen and Harbor Workers' Compensation Act (33 USCA 901 *et seq.*)" (*Id.* p. 19); which are the sole grounds for their disputing Petitioner's contention that only by laws enacted subsequent to ratification of the Convention can the permitted exceptions thereto be made (*Id.* p. 22).

Of course, Art. 12 of the Convention itself plainly shows that the Jones Act, Death on the High Seas Act and Longshoremen and Harbor Workers' Compensation Act are unaffected. They are laws which ensure "more favourable conditions than those provided by this Convention". (Art. 12). When Article 12 was offered as an amendment by Mr. Sharrenberg, Workers Delegate, United States of America, he said:

> "I have been told by some of my friends that it is unnecessary. Nevertheless, in view of the fact that in the United States the safeguards accorded to seamen who are sick or injured are in some respects very much higher than those prescribed in this text, I do trust that you will permit me to add this saving Article to the pending Draft Convention" (*Record of Proceedings, International Labour Conference*, 21st and 22nd Sess., Geneva, 1936, p. 82).

Mr. MacDonald, Workers Delegate, Canada, said:

> "It is quite true that Article 19, paragraph 11, of the Constitution affords the protection which this amendment of Mr. Scharrenberg's gives, but labour organizations do not have a copy of this Constitution at hand every time they want it, and consequently it is much better to have this clause at the end of the

Convention where everybody can find it when it is wanted. I therefore support the amendment submitted by Mr. Scharrenberg to add this new clause to the Convention" (Id. p. 83).

The Constitution Art. 19, par. 11 referred to (old Constitution), as well as corresponding Art. 19, par. 8 of the present Constitution, moreover, specifically use the phrase "to the workers concerned."

Yet *Amicus Curiae* asserts "Nothing is said as to who should be favored, shipowner or seaman" and that "It cannot be construed to be 'favorable to the seaman'." (*Brief of The United States Lines Company, Amicus Curiae*, p. 19.) This, and the pretense that the Convention affects the statutes cited, we submit, can be taken in no other sense than as calculated, deliberate misrepresentation.

The same is evident, moreover, even without reference to Art. 12. The liability provisions do not provide liabilities *for* sickness, injury or death, but liabilities "*in respect of*" sickness, injury or death, and merely *for* expenses of maintenance and cure, wages, repatriation, and burial expense, plus a provision as to safeguarding property. For these reasons also it is pure sophistry and misrepresentation to pretend that to apply these provisions involves overruling (in the Court below they said "repealing") the Jones Act, Death on the High Seas Act and Longshoremen and Harbor Workers' Compensation Act.

3. They further argue: that granting seamen shore-leave itself is an evil rather than wholesome practice and that "It is more often a detriment"; seamen have 15 minutes "coffee time" on shipboard; "There are radios for their diversion"; "They have also the companionship of

other seamen not on duty. During their non-working hours, they relax and enjoy themselves with men of their own social level;" "They have no 'rush hour' to endure as is the sad case of most shore workers when they ride to and from their place of work in buses or subways. Actually seamen have more free time than shore workers because they do not have to travel to their place of work" (*Brief of The United States Lines Company, Amicus Curiae*, pp. 10-11)!

Counsel who wrote that bit of sophistry could employ precisely the same words to extol the advantages of prison life over liberty. Penal laws and prison life, by that reasoning, become, not punishment, but privileges for enjoyment of which free men should vie in bidding.

In *Chelentis v. Luckenbach SS Co.*, 247 U. S. 372, 379, affg. CCA 2, 243 Fed. 536, 537-538, this Court and the Court below pointed out that:

> "If a seaman who had been *locked up or put in irons* for disobedience of orders were to sue the master for damages in a court of common law, *he could not recover like a shore servant*, such as a cook or chauffeur, who had received the same treatment" (247 U. S. 379; 243 Fed. 537-538). (Italics ours.)

A hasty check of prison laws reveals no Federal law subjecting even a convicted felon to such summary powers of physical discipline as being "placed in irons" or "placed in irons, on bread and water", as our statutes authorize a ship's master to do in case of seamen (46 U. S. C. §701, pars. Fourth and Fifth). No shore worker forfeits "one month's pay" for the mere temporary leaving of his place of employment, as does a seaman "For quitting the vessel without leave, after her arrival at the port of her delivery" (*Id.* par. Third). No shore worker forfeits "all or any part of the wages or emoluments which he has then earned" and his "clothes or effects" for merely quitting his job, as does a seaman for "desertion" (*Id.* par. First). No shore worker forfeits, as does a seaman "two day's pay" for reporting late, or for "absence at any time without leave" (*Id.* par. Second). See also 46 U. S. C. §595.

Even the statute as to "three watches" and "eight hours" work in one day is subject to "the judgment of the master or other officer" as to whether "the whole or any part of the crew are needed" (46 U. S. C. §673).

The truth is that, as a *practical* matter of human essentials, from even a wholly selfish shipowner's viewpoint, and wholly apart even from justice, humanity or benevolence, "No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it" (*Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 734).

4. "Amicus Curiae" Counsel are so versatile as on one page to refute and deny, and to assert and rely upon the opposite of, what they maintain on another. On the one hand, they claim that, *quite apart from the Convention*, seamen are allowed to recover maintenance and cure under facts which "range from barroom and street brawls to bedroom escapades"; that "Defense of claims by seamen to maintenance based upon alleged misconduct thus becomes a mirage" (*Brief of The United States Lines, Amicus Curiae*, pp. 11, 12-13, 24-26); that the *general maritime* rule is "unjust to the shipowner for *it leaves him defenseless* in claims of this kind" (p. 14). Then quite oppositely they argue that in interpreting the Convention "decisional law" should be treated as exceptions (p. 21)

because it required the seamen to bear the cost of their own maintenance "if the injury was due to misconduct or gross negligence" (pp. 21-22), and "*The terms of the Convention and their* impact on the existing laws of the United States make it inconceivable that the Convention be regarded as self-executing" (p. 20).

In other words, first claiming that decisional law affords the shipowner *no defense*, they ask this Court to *create* one by overruling decisional law; then claiming that decisional law *affords* a defense, but that "*The terms of the Convention*" leave the shipowner no defense, they ask that the Convention be held inoperative and that decisional law be maintained. Thus they really want this Court to overrule "decisional law", overrule the Convention, and make new rules to suit their whim; and if the Court will do this they don't care whether it be called "decisional law" or Convention law; or whether it destroy our Constitutional concept of the judicial power, destroy this and other similarly worded Conventions; destroy the International Labour Organization and its 31 years of work; and destroy the effectiveness of the treaty making power and our competitive foreign relations.

What they really want as shown by their conduct of the case from the beginning, and their dogged refusal to let go of it even after dismissal as to their private client was consented to, is to induce, by whatever means, some license from this Court for use in litigation, adjustment or rejection of injured seamen's small maintenance and cure claims of the epithetic, litigation breeding term "gross negligence" or some similar litigation breeding defense, and by all means to avoid that "rapid and inexpensive settlement of disputes concerning the liability of the shipowner under this Convention" (Art. 9), which all ratifying nations undertook to promote.

II

5. There is something either sinister or absurd, possibly both, in the filing here, as counsel for "Amicus Curiae", of a brief by the same counsel who, in name and by authority of the United States Attorney, represented the Government below; and the apparently designed dove-tailing of the Solicitor General's 137 page brief with the "Amicus Curiae" brief so as to present here, between them, the whole of the misrepresentive arguments made in the name of the United States below despite the Solicitor General's belated concession, in his brief here, that at least half of the propositions so argued below were error. While the Solicitor General withheld formal consent to the "Amicus Curiae" application the motion for leave stated "It is not the practice of the Department of Justice to so consent."

In the Petition (p. 7) and supporting brief (p. 23) we had pointed out that the United States as owner respondent had argued in its brief in the Court below opposite to the argument made by the Solicitor General in a Government's brief in this Court in *Farrell* v. *United States*, No. 267, Oct. Term 1948.

In opposing the writ the Solicitor General's brief sought to avoid the inconsistency by erroneously stating that "the *Farrell* case involved Article 4 of the Convention, not the article here presented" and that the Government had not urged in *Farrell* that "part of an article could be considered self-executing and the remainder of the same article inert" (Brief for the United States in opposition, p. 13, footnote 9). He took no forthright position respecting the operativeness and effect of either the liability provisions of the Convention or the provisos permitting that limited exceptions may be made, but asserted (p. 14, footnote 10) that should the writ be granted, he would urge that "dicta" in the *Aguilar* case be reconsidered. What "dicta" he did not disclose.

Nevertheless, the Court will note that in our subsequent Petitioner's Brief we made no further comment on the inconsistency, called to the Solicitor General's attention in the Petition, between the argument by or in the name of the United States Attorney below, and his own argument in his *Farrell* brief.

Now, in the new 137 page brief—14 years after adoption of the Convention; 12 years after its ratification following a four-departmental, Presidential and Senate Committee study and interpretation; 11 years after date of its effectiveness as law of the land without any Congressionally made exceptions following a new nine-departmental-Commission-Board, Presidential, House Committee, House of Representatives and Senate Committee study, with hearings; 6 years after Petitioner's injury and expenditures for maintenance and cure; 5¾ years after institution of the libel; 3 years after trial of the case; two years after the Solicitor General's argument of the *Farrell* case; 9 months after decision induced by false argument herein in the Court of Appeals; 2½ months after grant of certiorari; and one week before argument—after requiring Counsel for a seaman Petitioner to brief fully, with research and citations entailing gruelling toil (not to mention the printing cost), the self-executing character of the liability provisions—the Solicitor General concedes, nay, *asserts* that "*Since 1939*, the executive departments have *consistently maintained the position that the Convention is self-executing in part*"; that in *Farrell* "*the Government relied*, in part, upon Article 4, *paragraph 1*, of the Convention and *contended that it is self-executing*"; that "*This Court's acceptance of the Government's position* as to Article 4 (336 U. S. 511, 517, 524, n. 4) is, we believe, significant in interpreting Article 2, *paragraph* 1"; that "*it is obvious* that if Article 4, *paragraph 1*, is self-executing, Article 2, *paragraph 1*, must also be self-executing"; and that "*there can be no question that Article 2, paragraph 1, is self-executing*" (pp. 35, 36, 37). (Italics ours.)

This, of course, means that liability herein at all times properly was and now is to be determined *under and in accordance with the provisions of the Convention.*

6. By the Convention, moreover, the United States solemnly undertook, by Art. 9, to secure "the *rapid* and *inexpensive* settlement of disputes concerning the liability of the shipowner *under this Convention.*" Thereby it owed herein four-fold that responsibility, by virtue of being (1) itself shipowner of the vessel on which Petitioner was employed; (2) the largest shipowner in the world, whose example must, accordingly, be of great significance; (3) sovereign co-maker of and party to the Convention, with resultant responsibility to see even that other owners subject to its jurisdiction complied; and (4) Petitioner's own sovereign, with similar special responsibility to Petitioner.

We submit that in keeping with Art. 9, as well as the full provisions of the Convention, it is the affirmative duty of the United States, through its officials, attorneys, agents and claim adjusters, in every case where a maintenance and cure claim is asserted against the United States, to call attention of the injured man and even of his attorney, if he have one, and of any Court, if the case be litigated, to the provisions of the Convention and its controlling effect on the rights of the claimant; and that the Government's tactics in defense of this case represent a gross violation of that duty.

A Government official speaks with his tongue in his cheek when he refers in this respect to a seaman's representation by Counsel, knowing, as he must, that all such claims are small, and that Counsel therein cannot afford gruelling investigation—such, for example, as occurred herein—necessary in order to refute misrepresentation of treaty-made law, made out of or in Court by or in name of a United States Attorney.

The Convention is hidden in the Statutes at Large, and wholly unannotated there. When, therefore, the mighty office of United States Attorney in the foremost Southern District of New York asserts, even in formal briefs, when it is cited, that to attempt to enforce it would involve repeal of the Jones Act, Longshoremen's and Harbor Workers' Compensation Act and Death on the High Seas Act, and that it is or can better be treated as meaningless, and affirmatively insists to seamen, Counsel and the Court that the case is controlled by his construction of pre-Convention, ancient District or Circuit Court dicta, and induces primarily debate as to what was the pre-Convention decisional law, is it any wonder that no claimant to from $50 to $1500 or so has heretofore undertaken to ask this Court's judgment?

7. In footnote 9 on pp. 16-17 of his 137 page brief, the Solicitor General seeks to color the tactics below as made by private counsel, retained by the government *agent* and "*In protecting the interests of the agent.*" But the Court will note that the aforementioned arguments were made *after the case had been dismissed as to the agent by consent*, and when *only* the United States remained as respondent; and were submitted by or in name of the *United States Attorney*, although apparently authored by

the same counsel now submitting a brief for "Amicus Curiae", but then acting "of counsel" for the United States Attorney.

The Solicitor General, moreover, at p. 2 of his 137 page brief, footnote 1, appears to give the green light to such "Amicus Curiae" counsel's motion herein. No other shipping company or shipping company counsel have made any application to submit *amicus curiae* briefs, notwithstanding that New York is the greatest port in the world, nearly all great steamship companies have offices there, and the greatest of maritime law firms are there located; and nothwithstanding that the grant of certiorari herein has been published and even mentioned in law reviews as far as the Pacific Coast (See California Law Review, December). Why, then, these particular counsel, and presentation by them of precisely the same shockingly false arguments submitted below by or in name of the United States Attorney, representing the United States? And why the green light in the Solicitor General's brief?

8. It will be recalled that when at argument Mr. Justice Frankfurter asked whether Mr. Colby would undertake to assemble all departmental—particularly State Department—data relating to interpretation of the Convention, Mr. Colby hedged; and, if the recollection of Petitioner's Counsel is accurate, he never did agree that he would. Why?

With this small case presenting for the first time in this highest Court questions of such great national and international importance[1], and with the Government, including the State Department, having at stake its whole policy respecting this and similarly worded Conventions, whereas this lone seaman's stake is $664.16 expended on maintenance and cure, six years interest thereon, and the costs and disbursements incurred, are Mr. Colby's tactics designed to require that the seaman undertake that burden?

---

[1] It is, so far as Counsel has been able to discover, the first time this Court has been asked to interpret the permissive proviso permitting any nation unilaterally to make limited modifications of the otherwise uniform positive liability provisions of this or any international Convention.

Or is it Mr. Colby's prior knowledge that any past or present opinion or ruling he could procure from the State Department or any other of the interested executive departments, would completely confirm Petitioner's interpretation?

The memorandum of Director General Morse, which we did not see until a week before argument, is rendered ambiguous by having been directed tangentially by the Solicitor General's letter to the words "national laws or regulations[2]," instead of directly to the policy controlling words "*may make exceptions in respect of.*"

The truth is that for some reason assignable to an inexplainable mania for defeating, by whatever means, this seaman's $644.16 claim, the high office of the Solicitor General of the United States, adopting to that degree the pattern followed below by the high office of United States Attorney, we believe, has seen fit both to misrepresent the position and rulings of the interested executive departments.

---

[2] Note that Article 11, which was not called to the Director General's attention, reads: "*This Convention and national laws or regulations relating to benefits under this Convention* shall be so *interpreted and enforced* as to ensure equality of treatment to all seamen, irrespective of nationality, domicile or race". Pre-Convention Court decisions, rendered by judges who never heard of the Convention, certainly cannot be said to be laws "relating to benefits under this Convention" nor are they such as to be "interpreted and enforced," as such words are here used.

III

9. The misrepresentation of the Executive Departments' interpretations in the Government's brief (Brief for the United States, Argument I, B, 3, pp. 60-66), by Mr. Colby at oral argument, and by the Amicus Curiae brief (Brief of the United States Lines Company, Amicus Curiae, p. 21) and the misuse and misconstruction of Mr. Morse's memorandum (Brief for the United States, pp. 98-102 and pp. 40-47, 56) make a tactical house of cards for the building of which in this case there simply can be no worthy explanation.

The two briefs claim that it was represented by these departments, particularly Mr. Hull, that no increase of costs could be involved, and the Solicitor General quotes language from Mr. Hull's letter of August 18, 1937, which he represents to justify this claim. Yet, in Mr. Hull's letter of August 18, 1937, from which the Government's brief quotes at length (pp. 61-62), and just two paragraphs from where the Government's quotation was ended, Mr. Hull said:

> "It is desired to *call attention* to the following statements in the attached report of the Chairman of the United States Maritime Commission:
>
> "'*The adoption of some of the Conventions will increase the cost of operating ships.* Accordingly, if ratified by the United States and the required number of member countries of the conference, and enacted into law by them, *several of these Conventions will increase operating costs of American flag vessels*, and will also increase the operating costs of vessels of other nations that ratify such conventions'' (H. R. Report No. 1328, 76th Cong., 1st Sess. p. 10; see also

same letter in Senate Exec. Report 8, 75th Cong., 3rd Sess.). (Italics ours.)

In the letter of Chairman Joseph P. Kennedy, of the United States Maritime Commission, dated August 11, 1937, he stated:

> "These proposed conventions, if adopted as the law of the United States, will in some respects, as pointed out in the enclosed memorandum, affect the working conditions of many persons *and increase the operating costs of American vessels. In view of that fact* it is believed that an opportunity should be offered to the parties who will be affected, to submit their views on *the proposed changes in the applicable law of the United States* prior to final action being taken by this Government" (H. R. Report No. 1328, *supra*, p. 19; see also Senate Exec. Report 8, *supra*. (Italics ours.)

The memorandum he enclosed stated, cautioned, and suggested:

> "*No information is available from which accurate estimates can be made of increases in operating costs that would result if these conventions were ratified. Because of that factor* it is suggested that before the Government of the United States adheres to the conventions in question, either there be obtained definite information as to the course of action of the principal maritime countries upon the conventions, or that, if found desirable, the conventions be ratified with appropriate reservations so that they will become effective only when accepted by such countries. In the meantime, should any one of the proposed *changes* be considered desirable for American vessels, irrespective

> of the standards in foreign countries, such *changes* could readily be made by legislation without any special reference to or connection with these conventions and recommendations" (H.R. Report No. 1328, *supra*, p. 24; see also Senate Exec. Report 8, *supra*). (Italics ours.)

It also stated, with specific reference to this Convention 55:

> "If contrary to the above recommendation, it is decided to adhere to the convention, *responsibilities will be placed upon the shipowner greater than the present ones, and the cost of operating American vessels will naturally increase*" (*Id.*, p. 23). (Italics ours.)
>
> "Under this convention the shipowner *is liable* in respect of sickness and injury occurring between the date of reporting for duty and the termination of the engagement as well as death resulting from such sickness or injury. It is provided that national laws or regulations *may except* cases of injury incurred other than in the ships service; injuries and sickness due to the wilful acts, default, or misbehavior of the person and sickness concealed when employed" (*Id.*, p. 19).

A memorandum of August 13, 1947, by the Acting Solicitor of the Department of Commerce stated that "These conventions involve questions of policy" (H.R. Report No. 1328, *supra*, p. 13) and, referring specifically to the provisos permitting exceptions, said (as to Article 1, Ct. 2), "However, it is provided in paragraph 2 of this article that any member of the international labor organization *may except* such casual employees *from the convention*".

(*Id.*, p. 14), and "article 2 of the convention *makes a shipowner liable* in respect of sickness and injury, and death resulting from such sickness or injury (with a further provision that national laws or regulations *may make exceptions* in respect of injury or sickness occurring under certain conditions referred to in paragraph 2 of that article)" (*Id.*, p. 16).

In 1939, in connection with submitting *H.R. 6881* The Secretary of State said, by letter of June 12, 1939:

> "Some of the articles of the convention, however, after stating the general rule, provide that national laws may make specified exceptions thereto. If this Government is to be excepted from certain obligations of the convention or alterations in our present practice, it is necessary to do so affirmatively [illegible] statute" (Id., p. 6).

The Maritime Commission, by letter dated July 7, 1939 said:

> "The extent of the liability of the shipowner in all maritime nations has depended, until recently, upon the maritime law * * * The provisions of the convention are so framed as to permit *the adaptations* required by workmen's compensation laws" (Id., p. 32)

He refers to the permitted exceptions under Art. 2 (2) as being made "*by section 4 of the bill*" (Id., p. 32). The bill did not become law.

The Secretary of Labor wrote:

> "The convention prescribes general standards but leaves certain details *to be prescribed* at the *option* of the signatories. H. R. 6881 is designed to make neces-

sary provision for these *optional matters* * * * " (Id., p. 49).

IV

10. When analyzed the Government's argument reduces to the contention that the Courts should "make exceptions" *because* Congress omitted or refused to make them; whereas in reality the omission of Congress to act is a most cogent reason why the judiciary should not act in its place.

It was indeed *Congress* to which the administration submitted the question of whether to "make" or not to "make exceptions?" It was *Congress* to whom the administration applied in 1939 for determination or exercise of the "national discretion".

The *omission* or refusal to "make" the discretionary exceptions, is as much an exercise of the "national discretion" as would be an actual making of exceptions. Compare *Julius* v. *Lord Bishop of Oxford*, L. R. 5 A. C. 214, where the Lord Chancellor (Earl Cairns) said that "the question is * * * is the Bishop *bound* * * * to issue a commission, or has he *a discretion as to whether he will issue it or not?*" (p. 222), and "I will only add that *if I am right in holding that the bishop has* * * * *a discretion* * * * *your Lordships have not, as it seems to me, any occasion or indeed any right to examine into the manner in which, or the principles upon which, that discretion has been exercised*" (p. 228). Lord Penzance said that words conferring discretion are "permissive and enabling only" (p. 234), Lord Selborne that they are "potential" (p. 235), Lord Blackburn that they were "equivalent to *may*" (p. 242) and "gave the bishop power to grant farther inquiry * * *, trusting that he would always do so where it was proper, but *leaving it open to him, when convinced that it was not proper, to decline to act*" (p. 238).

7

11. The political, policy making, "national discretion" exercising departments of our Government are the Executive department and Congress—plus that portion of the two represented in the treaty-making power. These have acted. The 1939-1940 history of *H. R. 6881* shows this. Such bill *was* introduced. It represented the interpretation by practically the entire administrative branch that the department of government wherein the "national discretion" resided was Congress. That discretion was as much a discretion to *omit* to "make exceptions" as to "make" them. There could be no discretion to "make exceptions" without equally, and as part of it, a discretion to *omit* to "*make exceptions*". The hearings before the House Committee July 11, 1939 (Hearings, Committee on Merchant Marine and Fisheries, 76th Cong. 1st Sess., on H. R. 6726 and H. R. 6881) and before the Senate sub-committee July 23-25, 1940 (Hearings, Subcommittee of the Committee on Commerce, 76th Cong., 3rd Sess., on H. R. 6881) were a year apart. The Executive departments submitted letters at both hearings, and the administration was represented in testimony. So were shipowners and seamen. The legislation was not enacted. This was as completely within the "national discretion", and control of Congress, as would have been its enactment.

The same discretion, moreover, resides in Congress today. Whence comes the theory, therefore, that the *judiciary* must exercise the discretion? Why do Mr. Colby and Amicus Curiae counsel, in effect, petition this Court rather than Congress to "make exceptions"? The "question is at least debatable" whether the Convention liabilities should be "left unregulated, or in some measure restricted" and "that decision" is "for Congress" and a Court's or jury's judgment cannot "be substituted for it" (cf. *United States v. Carolene Products Co.*, 304 U. S. 144, 154).

Tucked away in two footnotes of the Solicitor General's brief (Footnote 40, p. 37, footnote 44, p. 43), the Government concedes that the question is one of "municipal, not international, law".

This Court has often ruled that "It is our business to execute the law as we find it, and not to *make* or *modify* it" (*Bank* v. *Sherman,* 101 U. S. 403, 496); "the power to *make* and *unmake* is essentially political and not judicial" (*United States* v. *Old Settlers,* 148 U. S. 427, 468); "It is true the *non action* of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by *inverting the ordinary meaning of words*" (*De Lima* v. *Bidwell,* 182 U. S. 1, 198). (Italics ours.)

Congress can, when need exist, act more quickly than the courts. It can by hearings, moreover, better determine the national wish and policy; and can also determine this on a broad level, debating and taking account of all points of view. The Courts can act only in determination of the specific "case" or "controversy" before them. If "exceptions" are so vitally needed, why have they not again been sought from Congress? Why are they sought here instead? And what becomes of the "national discretion" to "make exceptions", if this Court rule that, despite omission of Congress to "make" any, they exist? How can Congress then exercise a discretion to "make" or *omit* to make what already exists?

12. The "repeal" theory begs these questions, and is inherently fallacious. Even *H. R. 6881* was not worded as making any "repeals" of "decisional law". Nor was Title II thereof as added by Senator Overton, nor *H. R. 7626* which was considered in the House. Nor were the Longshoremen and Harbor Workers' Compensation Act,

the Jones Act, the Death on the High Seas Act or the Employers Liability Act. They simply enact a new rule of liability which *supercedes* anything inconsistent with it. Indeed, §26 of the Seaman's Act of March 4, 1915, c. 153, 38 Stat. 1185, which represented, in effect, an actual attempt to apply such a "repeal" theory, by providing that "seamen having command shall not be held to be fellow-servants with those under their authority", was held in *Chelentis* v. *Luckenbach SS Co.*, 247 U. S. 372, 384, to be meaningless, of no consequence and irrelevant. But in *Reed* v. *Director General of Railroads*, 258 U. S. 92, 95, with the same Justice writing, it was held unanimously that "*the first section*" of the Employers Liability Act "has the effect of abolishing . . . the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff." The Court said that "To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad while engaged in interstate commerce *shall be liable* to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents or employees of such carriers" (258 U. S. 95).

So it is with every "shall be liable" enactment. So it is with the liability provisions of the Convention here. *They* correspond so the terminology of "*the first section*" of the Employers Liability Act. *They* are the statute-like provisions, and accordingly supersede, just as would like provisions in a statute, the pre-Convention rules and decisions.

The proviso clauses permitting that national laws "may make" exceptions, on the other hand, are not statute-like. They would never have been embodied in a statute of a lone sovereign. It would not have been necessary, and even would have been silly, for such lone soverign's legislature to provide that it "may make" exceptions. It would have both the power and the right to do so whenever it chose, without so providing. Even here, every sovereign has the *power* to do so, and would have such *power* without the permissive clause. But to exercise such *power* without consent of the other parties to the treaty would not be its *right*, in absence of provision therefor in advance. The proviso clauses, thus, are not even the source of *power*, but the manifestation only of *permission* or *consent*. The question of *power*, therefore, remains as it would have been had the liability provisions been made by statute, a question of our own constitutional division of powers of government. What branch could "make exceptions" to liability provisions of a statute which contained none?

Clearly, Congress alone. As the treaty-making power, as even the Solicitor General now concedes and contends, definitely has made as though by statute positive and enforceable liability provisions, but equally as definitely has *not* made exceptions, but rather only agreed multilaterally with the other treaty sovereigns that each, including our own government "may make" exceptions, at its national option or "national discretion," it clearly is, under our Constitution, Congress alone that "may make" them—if and when it chooses, and equally may *omit* to "make" them as long as it chooses.

13. This construction is confirmed instead of rebutted by the very distinction attempted by the Solicitor General of the Officers Competency Certificate Convention legislation mentioned in Petitioner's Brief, pp. 31-32. The Solicitor General states as the distinction that "The exception embodied in that legislation was not reflected in any existing

rule of maritime law and hence could be availed of *only through enactment of a specific statute*" (Brief for the United States, p. 65, footnote 59; italics ours). In the first place, this affirms that it is "*only through enactment of a specific statute*" that our country "may *make*" exceptions. But, of more importance, it confirms that until and unless some research be undertaken into pre-Convention decisional law, the treaty provision is both perfectly simple and perfectly clear. It means what it says, and our government, accordingly, under our Constitution, *can* "make" exceptions only through enactment of a specific statute.

It is only through reaching back into pre-Convention decisional law—by exploring whether or not there existed any pre-Convention decisional law, and then (if any be found) by studying, assorting and applying it—that any question or doubt can be raised, or any contention be advanced for "construing" the simple provision to mean something wholly different than it clearly, and admittedly, means, if there be none such to so apply. Moreover, the reaching back is into only our own pre-Convention decisional law. If Afghanistan, for example, became a ratifying member and acquired a merchant marine, it would have no pre-Convention decisional law to refer to; and the provision would be perfectly plain. To have exceptions apply, it would have to "*make*" them—just as the Convention provides. But the Solicitor General does not suggest that we reach back to discover the non-existence of pre-Convention law in Afghanistan, as proof that the Convention clause nevertheless has clear meaning; he proposes to reach only into the pre-Convention field of a sovereign from whose old rulings some doubt can be created.

This, however, is directly contrary to this Court's consistent rulings, perhaps best evidenced in *Hamilton* v.

Rathbone, 175 U. S. 414. There, under decisional common law a married woman had been without capacity to convey her property without consent of her husband; then by an 1869 statute it had been provided that property acquired by her "in any other way than by gift or conveyance from her husband, shall be as absolute as if she were feme sole," and she might dispose of "the same, or any interest therein, in the same manner and with like effect as if she were unmarried." Then by 1874 revision of statutes, the old act "was rearranged," and although new §727 contained the same provision as to the absoluteness of her property acquired otherwise than from her husband, new §728 provided that any married woman might dispose of "her property, or any interest therein, in the same manner and with like effect as if she were unmarried". The Court stated the decisive question as being whether §728 was to be "construed as an independent act, or whether the plaintiff is at liberty, by referring to the prior act from which it was taken, to show that it was the intention of Congress to limit it to the cases named in such prior act" (p. 419). This Court, by Mr. Justice Brown, said:

> "The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. If section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. * * * The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of refer-

> ence to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject" (175 U. S. 421).

When we recall that, in addition to the revision process, here there was a purpose of "codifying and uninformising the law" (Petitioners Brief, p. 19); that in connection with adopting Article 12 it was specifically stressed that even it should be in the Convention "where everybody can find it when it is wanted" and without the necessity of referring even to a copy of the Labor Organizations' own Constitution, which might not be "at hand every time they want it" (*supra* p. 2 hereof); that Article 12 is, in fact, the *only* savings clause, and cannot possibly be said itself to save pre-Convention decisional law defenses; that the natural construction of the proviso permissive clauses to permit only post-Convention modifications makes it simple for anyone at anytime in any country to quickly ascertain precisely what is the law, whereas the other would require always and everywhere just as much (and even more) research and distinction making as though the Convention had not been adopted; and that the whole principle of *reciprocity*, so vital in treaties, would be destroyed, because one country would refer to conflicting and confusing pre-Convention decisions, another to pre-Convention statutes, others yet to different pre-Convention decisional law or statutes, and still others to a pre-Convention absence of precedent—with some obliged to "make", others to "*un*make", still others to modify, either upward or downward, their own old rules, if any uniformity were to be obtained—we submit there can be no doubt whatever, under *Hamilton* v. *Rathbone, supra*, or under the Convention, that these permissive proviso clauses should be construed as Petitioner contends.

V

Neither of the opposition briefs shows anything or any authority for treating Warren's conduct as more than bare negligence—mere momentary, inadvertent absence of considered carefulness.

Neither shows any reason why the ever recurring shipowner claims that liability spells insurance should bar rather than occassion recovery.

Petitioner should be allowed interest, as well as costs and disbursements, in addition to his $644.16 maintenance and cure expense.

Respectfully submitted,

Saul Sperling,
and
Charles A. Ellis,
Proctors for Petitioner.

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No. 87

In the Supreme Court of the United States

October Term, 1950

Walter K. Warren, petitioner
v.
United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 87

WALTER K. WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court for the Southern District of New York (R. 97–109, 115–116) are reported at 75 F. Supp. 210 and 76 F. Supp. 735. The opinions of the Court of Appeals for the Second Circuit (R. 137–141, 154–157) are reported at 179 F. 2d 919.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1949 (R. 142). A timely petition for rehearing (R. 143–153) was denied on March 2, 1950 (R. 154–157). The petition for a writ of certiorari was filed on May 24, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below erred in holding that, in the circumstances of this case, petitioner's claim to maintenance and cure was barred by his own gross fault.

TREATY INVOLVED

Article 2 of the Shipowners' Liability Convention, 1936, 54 Stat. (Pt. 2) 1693, provides:

> ### Article 2
>
> 1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury.
>
> 2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;
>
> (b) injury or sickness due to the willful act, default, or misbehavior of the sick, injured, or deceased person;
>
> (c) sickness or infirmity intentionally concealed when the engagement is entered into.
>
> 3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly at-

tributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

STATEMENT

This suit was instituted by petitioner in the District Court for the Southern District of New York by libel filed on March 2, 1945 (R. 1, 3-6). Petitioner sought to recover maintenance and cure from the United States, as owner, and from American South African Line, Inc., the Government's general agent or ship's husband, as "operator," of the steamship *Anna Howard Shaw*.[1] Answers were filed by both named respondents (R. 7-11, 13-15), both of which raised the defense, *inter alia,* that the claim to maintenance and cure was barred by petitioner's gross fault or his deliberate act of indiscretion (R. 9, 14).

The case was tried on October 29 and October 30, 1947 (R. 34-90). Briefly, the pertinent facts, as found by the district judge, are as follows (R. 101-102):[2] Petitioner, a messman aboard the

---

[1] The title of the libel indicated that it was an action for "wages, overtime and maintenance" (R. 3). The claim for wages and overtime was abandoned during the trial (R. 52) and the case was maintained solely as one for maintenance and cure.

[2] The facts found by the district court are derived from the testimony of petitioner at the trial. As in most cases of this type, such testimony is the only direct evidence available to the shipowner. In this connection, it may be noted that petitioner gave conflicting accounts of the nature of the accident for other purposes. For example, the Stapleton Hospital history indicates a statement by petitioner that he leaned against a guard rail which broke (R. 94a). Petitioner's administrative claim states that the railing around the balcony at the

Anna Howard Shaw, went ashore on leave while the vessel was in the Bay of Naples on October 30, 1944. Together with two other members of the crew, he spent some time sightseeing in the water-front town of Bagnoli, stopping at various stores and drinking a bottle of wine. After a time, they entered a dance hall and stayed about an hour and a half, most of which time, according to petitioner, was spent in dancing. Petitioner entered an adjoining room in the dance hall, overlooking the sea, which had French doors reaching to the level of the floor. Outside of the room petitioner observed a wholly unprotected ledge which extended out from the building some two or three feet. Petitioner went out on this ledge to a position where the toes of his shoes were about six inches from the edge and leaned over, at the same time taking hold of a half-inch rod which was apparently affixed to the building to his right. As he grasped the rod and leaned over the edge, the rod came off and petitioner lost his balance and fell, fracturing his right lower leg.[3]

---

dance hall broke (R. 93). The deck log of the vessel, based on petitioner's statement, indicated that petitioner fell off a cliff (R. 86).

[3] Petitioner was immediately hospitalized in Naples, where his leg was set and put in a cast (R. 40–41). He was subsequently flown home and treated at the Jackson Memorial Hospital in Miami, the Stapleton Marine Hospital at Staten Island and the Detroit Marine Hospital (R. 40–44, 91a–91b). The transportation as well as the hospitalization and care were, of course, without cost to petitioner.

The district court awarded maintenance to petitioner in the amount of $644.16[4] and entered a decree for that sum against the general agent, American South African Line, Inc. (R. 109). The libel was dismissed as to the United States on a venue point, namely, that the ship was not present in the district at the time that the libel was filed (R. 99). The general agent, American South African Line, Inc., was held answerable as the operator of the vessel under this Court's decision in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707 (R. 99–101).[5]

On the merits, the district court held that petitioner was not precluded from claiming maintenance solely by virtue of the fact that he was ashore for his own recreational purposes (R. 103–107). Further, the district court held that petitioner was "less sober than he says he was, but * * * not so under the influence of liquor as to be barred from recovery" (R. 108).[6] The final question on the merits was whether petitioner's injury was the result of his own gross fault. As to petitioner's course of action on the ledge, the district court described going on the ledge as a "perilous undertaking" and leaning over the edge as "even more perilous" (R. 102). Further, the district court recognized that petitioner took only a "casual glance" at the rod on the wall, which looked like a "lightning arrester or something of that type," and made no claim to having done more (R. 102). However, the district court felt that petitioner's conduct fell short of the recklessness which would serve to bar his claim (R. 108–109).

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[4] This amount apparently represents a daily allowance for periods December 21, 1944, to February 27, 1945, and May 29, 1945, to July 1, 1945 (R. 55).

[5] This holding was affirmed on rehearing (R. 115–116).

[6] The record of the Army Hospital in Naples, made at the time of petitioner's entrance, indicated acute alcoholism (R. 73).

An appeal was taken by the general agent from the decree entered against it by the district court (R. 125).[7] Petitioner cross-appealed from the decree which dismissed the libel as against the United States (R. 132–133). During the pendency of the appeal this Court handed down its decision in *Fink* v. *Shepard SS Co.*, 337 U. S. 810, and, accordingly, the decree against the general agent was reversed by agreement of the parties (R. 138). The dismissal of the libel as against the United States on the ground of improper venue was also reversed (R. 138–139), and the court below proceeded to consider the case on the merits as against the United States.

The doctrine of *Aguilar* v. *Standard Oil Company*, 318 U. S. 724, was interpreted and applied as permitting recovery of maintenance and cure unless the seaman's injury resulted from his willful misbehavior or gross fault (R. 139–140). After reviewing the facts, the court below concluded that petitioner's actions, in circumstances of danger, did not show "* * * even a minimal degree of regard for the consequences of his act" and, accordingly, found his claim to maintenance and cure barred by his own gross fault (R. 139–141).

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[7] The general agent's brief urged three grounds for reversal: (1) that as general agent it was not liable for maintenance: (2) that a shipowner is not liable for maintenance where the seaman is injured while engaged in recreational activities; (3) that petitioner could not recover because injured as a result of his own gross fault or indiscretion.

A petition for rehearing was filed which raised for the first time the contention that the liability of the United States for maintenance and cure was absolute by virtue of Article 2 of the Shipowners' Liability Convention, 1936, *supra*, pp. 2–3 (R. 151–153). The substance of petitioner's contention was that clause 1 of Article 2, placing liability for maintenance and cure on the shipowner, was in effect and binding, but that clause 2 of Article 2, permitting an exception where the injury had resulted from the willful act, default or misbehavior of the claimant, was not self-executing and, accordingly, not in effect (R. 152). Upon consideration of the petition for rehearing, the court below held, one judge dissenting, that Article 2, if self-executing, was in effect as a unit and that it required no legislation to make it operative (R. 154–157).

ARGUMENT

Petitioner asserts that the court below erred in rejecting his claim to maintenance and cure, basing his contention on either of two grounds.

First, he contends that clause 1 (a) of Article 2 of the Shipowners' Convention, 1936, *supra*, p. 2, is self-executing, and that a shipowner's duty thereunder to provide maintenance and cure is absolute in the absence of legislation by the Congress putting into force the exceptions permitted by clause 2 (b) of Article 2 of that Convention (Pet. 4–5, 20, 22–23, 24). Secondly and alternatively, petitioner contends that if clause 2 (b) of Article 2 of the Convention is self-executing, recreational activities and conduct at the time he incurred the injury were not such as would defeat his claim to maintenance and cure under that clause or under the general maritime law (Pet. 5–6, 11–14, 25–33).

1. Under petitioner's first point he contends that the United States, as the owner of the ship, is made absolutely liable for his maintenance and cure by clause 1 (a) of Article 2 of the Convention (Pet. 4–5, 22–33). Petitioner seeks his principal support for this contention in the separate opinion of Mr. Chief Justice Stone in the case of *Aguilar* v. *Standard Oil Company*, 318 U. S. 724, 738, wherein Mr. Chief Justice Stone dissented from the majority decision in the *Aguilar* case, but briefly concurred in the result in the companion case of *Waterman Steamship Corp.* v. *Jones*[8] on the ground that clause 1 (a) of Article

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[8] It should be noted that *Waterman Steamship Corp.* v. *Jones*, No. 582, Oct. T., 1942, which was considered with and decided with the *Aguilar* case, involved events occurring subsequent to the effective date of the Shipowners' Liability Convention.

2 of the Shipowners' Liability Convention was self-executing but that clause 2 (a) of that Article permitting exceptions for injuries incurred otherwise than in the service of the ship was not operative in the absence of legislation putting it into effect.

The majority of the court below after careful consideration reached the conclusion that if clause 1 of Article 2 is self-executing, clause 2 of that Article is likewise self-executing, unless the language "national laws or regulations" appearing in the latter clause must be read so as to exclude "decisional laws." Hence, the majority of the court below interpreted the language "national laws or regulations" as including the pertinent principles of general maritime law as enunciated and enforced by the courts of the United States as well as laws enacted by the Congress. As the majority opinion states, great respect is due to the opinion of Mr. Chief Justice Stone on the point, but the statement in his opinion discloses no reasoning, or statement from the history of the Convention Conference to support it. On the other hand, there are plausible and sound reasons underlying the interpretation placed by the majority of the court below on Article 2.

Clauses 1 and 2 of Article 2, combined are clearly declaratory of the pertinent principles of the general maritime law as enforced by the courts of the United States. See *Aguilar* v. *Standard Oil Company, supra,* wherein this Court recognized that a shipowner's liability to a seaman for maintenance and cure from the beginning to the end of the voyage is traditional, but that it is subject to certain exceptions which are set forth in the opinion in terms plainly synonymous with the terms that specify the exceptions permitted by clause 2 of Article 2 of the Convention. Thus, Article 2 of the Convention is merely declaratory of the pertinent general maritime law, since clause 1 of that Article recognizes the traditional liability of a shipowner for maintenance and cure and measures the period during which that liability may arise, and clause 2 specifies only the exceptions which the courts of the United States have long permitted. In the circumstances, there was existing law in the United States at the time of the adoption of the Convention which embodied the exceptions permitted by clause 2 of Article 2 thereof. The majority offered several suggestions to indicate the improbability that the Convention Conference intended that clause would not be operative without Congressional legislation (R. 156), all of which suggestions we believe to be sound. And there are other sound indications that the Conference had no such intention.

For example, if there had been in force on the effective date of the Convention a statute embodying the exceptions permitted by clause 2, it is obvious that the statute would not have been repealed by the Convention and it would not, therefore, have been necessary to reenact it in order to make the exceptions contained in clause 2 operative. This would be so because the Convention would not be inconsistent with the statute, which would have permitted them to stand together. The same would be true of a duly promulgated regulation. Like reasoning dictates that the Convention, which was not inconsistent with the pertinent principles of the general maritime law in force in the United States on the date it was adopted, did not operate to abolish or repeal those principles. Consequently, those principles are still in force and effect in the United States, and, like the case of an already existing statute, no further legislation is necessary to make them operative.

Moreover, it is illogical to assume that the Conference was concerned with the form which the national laws necessary to carry the Convention into force would take. It was notorious that the various nations had different systems of law and different methods of enforcement, and the Conference was well aware of that fact. It is scarcely likely that the Conference expected that it could bring all of the participating nations under one form of law. Why then would it have an interest in insisting that all of the laws of the various nations on the subject be in statutory form? We submit that no such result was contemplated by the Conference. The history of the Convention Conference is barren of any information to indicate that the Conference was concerned with the manner in which any of the subscribing nations would enforce the exceptions which the Convention permits. In this connection it may be noted that lists of specific questions were distributed to the various nations participating in the International Labour Conference concerning the nature of the provisions to be included in the convention, and responses to those questions were submitted. Many of the responses were rather elaborate, especially with respect to the questions which suggested exceptions. It is significant, however, that in none of the responses is there any requests or suggestions that the exceptions would have to take the form of national statutes before they would become operative in nations where the principles of the general maritime law were already recognized or enforced in another form. See Report II, International Labour Conference on the protection of seamen in case of sickness or accident, 1931, pages 1–108.

As indicated by petitioner, there are certain statements, made by the Secretary of State and others, appearing in the legislative background of H. R. 6881 (76th Cong., 1st sess.), a bill to implement the Convention, but which was never passed, which evidence a view that Article 2 could be split and considered as partially self-executing and partially in need of statutory implementation.[9] These statements, like those of Mr. Chief Justice Stone in the *Aguilar* case, are not supported by reasoning; nor is it clear that "decisional law" was under consideration when the statements were made. There are, however, contrary indications in the same legislative background. Recognizing that there had been considerable discussion as to the self-executing nature of articles in the Convention, the House Committee on Merchant Marine and Fisheries, in its report on H. R. 6881, specifically stated that it would not "* * * undertake to say that the convention or any part thereof [was] self-executing. * * *" and that it would not "* * * concede that any part of the draft convention [was] self-executing. * * *". H. Rep. 1328, 76th Cong., 1st sess., pp. 2, 3, 4. We do not urge that any part of the legislative history of a bill never enacted can be controlling. However, if weight is to be accorded to the statements indicated by petitioner, we submit that the views of the controlling committee likewise deserve to be considered. Far more compelling considerations, we submit, are to be found in the logic and fairness of the interpretation placed upon Article 2 by the court below, for the net result of the technical interpretation urged by petitioner would be to benefit only those seamen "* * * least deserving of protection, since their sickness or injury resulted from their own default or was intentionally concealed from their employer (R. 156).

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[9] Petitioner incorrectly seeks to find support for this view in the Government's brief in *Farrell* v. *United States*, 336 U. S. 511 (Pet. 7). The Government did not urge, nor did the court find, that part of an article could be considered self-executing and the remainder of the same article inert. Moreover, the *Farrell* case involved Article 4 of the Convention, not the article here presented.

2. Petitioner's second and alternative contention that, assuming clause 2 (b) of Article 2 to be self-executing, his activities at the time he incurred the injury were not such as to defeat his claim to maintenance and cure under either the Convention or the general maritime law, is, we submit, refuted even by this Court's pronouncements in the case of *Aguilar* v. *Standard Oil Co., supra,* so far as general maritime law is concerned.[10] In *Aguilar,* this Court fully reviewed a seaman's traditional right to recover maintenance and cure for injury or sickness and indicated that the right existed unless the injury resulted from some "* * * disqualifying misconduct * * *." 318 U. S. at page 734. Various phrases were used to guide inquiry into the type of disqualifying misconduct intended. For example, the court stated that only "* * * some willful misbehavior or deliberate act of indiscretion * * *" would suffice to remove the protection; that the protection was owed by

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[10] Should the writ be granted, we will urge that the dicta in the *Aguilar* case be reconsidered and the application of that case brought into harmony with the law of other maritime nations and of other forms of workmen's compensation.

the shipowner regardless of fault "* * * unless gross * * *." 318 U. S. at pp. 731, 734.

It can scarcely be denied that petitioner's conduct in this case was a deliberate act of indiscretion, for it was done in reckless disregard for his own safety while he was exhilerated to some extent by the influence of alcohol.[11] It is true that the court below spoke of the term "gross negligence" as representing a type of conduct that will defeat recovery, rather than the term "gross fault" used by this Court in the *Aguilar* case to characterize the types of conduct that will defeat a seaman's right under the general maritime law to recover maintenance and cure. However, the court below concluded, in effect, that petitioner acted in reckless disregard for his own safety (R. 141), which conduct is plainly of the type which will defeat recovery under this Court's pronouncement in the *Aguilar* case. Thus, petitioner's act falls squarely within one of the types of conduct which this Court has indicated will bar recovery under the general maritime law.

Furthermore, the language used in clause 2 (b) of Article 2 of the Convention to characterize the type of misconduct that will defeat a seaman's right to recover maintenance and cure, is "wilful act, default or misbehavior." This language is plainly synonymous with the various phrases, including the phrase "deliberate act of indiscretion," used by this Court in the *Aguilar* case to indicate the types of conduct that will defeat recovery under the general maritime law. It is true that at the time clause 2 (b) of Article 2 (then Article ~~3)~~ was before the Committee of the International Labour Conference on the protection of seamen in case of sickness or accident, an amendment was offered to substitute for the words "wilful misconduct" (then appearing in the draft of that clause) the words "gross negligence." However, this amendment was not adopted, since by compromise the word "wilful" was retained and the words "act, default or misbehavior" were substituted for the word "conduct." See Record of Proceedings, International Labour Conference, Twenty-First Session and Twenty-Second Session, Geneva, 1936, page 250. We do not believe that the rejection by the Committee of the words "gross negligence," in view of its acceptance of words synonymous with those used by this Court in the *Aguilar* case, can reasonably imply an intention on the part of the Conference to remove from disqualifying conduct an act by a seaman which is done in reckless disregard for his own safety, even though such act might also be considered to be grossly negligent, as the majority of the court below apparently considered it to be in this case.[12] Thus, assuming that clause 2 (b) of Article 2 is self-executing, the Convention requires no different result in this case from that which would be required by the general maritime law as patterned by this Court. On the same assumption, the majority of the court below were clearly correct in holding that petitioner was not entitled to recover.

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[11] The trial court found that petitioner was not drunk, but that he was less sober than he claimed to be, although the court stated that he was not so under the influence of liquor as to be barred from recovery (R. 108).

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1950.

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[12] The majority of the court below stated that the words "wilful act, default or misbehavior" now appearing in clause 2 (b) of Article 2 of the Convention are synonymous with the words "gross negligence." This statement, even if it be inaccurate, which we do not concede, cannot alter the fact that those words are synonymous with the words "deliberate act of indiscretion" used by this Court in the *Aguilar* case or the further fact that they squarely cover petitioner's conduct in this case.

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No. 87

In the Supreme Court of the United States

OCTOBER TERM, 1950

WALTER K. WARREN, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court for the Southern District of New York (R. 97–109, 115–116) are reported at 75 F. Supp. 210 and 76 F. Supp. 735. The opinions of the Court of Appeals for the Second Circuit (R. 137–141, 154–157) are reported at 179 F. 2d 919.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1949 (R. 142). A timely petition for rehearing (R. 143–153) was denied on March 2, 1950 (R. 154–157). The petition for a writ of certiorari, filed on May 24, 1950, was granted on October 9, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Article 2 of the Shipowners' Liability Convention provides, in paragraph 1, that the shipowner shall be liable for maintenance and cure in cases of sickness or injury occurring during the term of the shipping engagement, but provides further, in paragraph 2, that "national laws or regulations" may make exceptions where the sickness or injury is due to the "willful act, default or misbehavior of the seaman.[1] Congressional legislation implementing the Convention has not been enacted.

In this action, petitioner, a merchant seaman employed by the United States, seeks to recover maintenance and cure for injuries sustained while on authorized shore leave. The court below denied recovery under the general maritime law because of petitioner's misconduct, holding that its decision was not affected by the terms of Article 2 of the Convention.

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[1] Paragraph 2 also permits an exception for injuries "incurred otherwise than in the service of the ship." In a motion for leave to file a brief *amicus curiae*, the United States Lines Company has urged that *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, should not be extended beyond its facts to permit recovery for injuries incurred while the seaman was ashore beyond the premises where the vessel was docked. Because we believe that recovery in the present case is in any event precluded by the affirmative misconduct of the petitioner, we have not thought it necessary to take a position on the question whether the injury here occurred in the service of the ship.

The Government believes that paragraph 1 of Article 2 of the Convention is self-executing. Accordingly, the controverted questions are as follows:

1. Whether the exceptions permitted by paragraph 2 of Article 2 are operative, in the absence of an implementing statute, by virtue of the general maritime law.

2. Whether petitioner's misconduct was such "wilful act, default or misbehavior" as to bar recovery of maintenance and cure.

TREATY INVOLVED

The Shipowners' Liability Convention (Draft Convention 55 of the International Labor Organization), 54 Stat. 1693, is set forth in the English text in the Appendix, pp. 84–96. In pertinent part, the Convention provides as follows:

> ARTICLE 2. 1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury.
>
> 2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the willful act, default, or misbehavior of the sick, injured, or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

STATEMENT

This suit was instituted by petitioner in the District Court for the Southern District of New York by libel filed on March 2, 194[illegible] (R. 1, 3–6). Petitioner sought to recover maintenance and cure from the United States, as owner, and from American South African Line, Inc., the Government's general agent or ship's husband, as operator, of the steamship *Anna Howard Shaw*.[2] Answers were filed by both named respondents (R. 7–11, 13–15), both of which raised the defense, *inter ulia,* that the claim to maintenance and cure was barred by petitioner's gross negligence or his deliberate act of indiscretion (R. 9, 14).

The case was tried on October 29 and October 30, 1947 (R. 31–90). Briefly, the pertinent facts, as found by the district judge, are as follows (R. 101–102):[3] Petitioner, a messman aboard the

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[2] The title of the libel indicated that it was an action for "wages, overtime and maintenance" (R. 3). The claim for wages and overtime was abandoned during the trial (R. 52) and the case was maintained solely as one for maintenance and cure.

[3] The facts found by the district court are derived from the testimony of petitioner at the trial. As in most cases of this type, such testimony is the only direct evidence available to

Anna Howard Shaw, went ashore on leave while the vessel was in the Bay of Naples on October 30, 1944. Together with two other members of the crew, he spent some time sightseeing in the water-front town of Bagnoli, stopping at various stores and drinking a bottle of wine. After a time, they entered a dance hall and stayed about an hour and a half, most of which time, according to petitioner, was spent in dancing. Petitioner entered an adjoining room in the dance hall, overlooking the sea, which had French doors reaching to the level of the floor. Outside of the room petitioner observed a wholly unprotected ledge which extended out from the building some two or three feet. Petitioner went out on this ledge to a position where the toes of his shoes were about six inches from the edge and leaned over, at the same time taking hold of a half-inch rod which was apparently affixed to the building to his right. As he grasped the rod and leaned over the edge, the rod came off and petitioner lost his balance and fell, fracturing his right lower leg.[4]

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the shipowner. In this connection, it may be noted that petitioner gave conflicting accounts of the nature of the accident for other purposes. For example, the Stapleton Hospital history indicates a statement by petitioner that he leaned against a guard rail which broke (R. 94a). Petitioner's administrative claim states that the railing around the balcony at the dance hall broke (R. 93). The deck log of the vessel, based on petitioner's statement, indicated that petitioner fell off a cliff (R. 86).

[4] Petitioner was immediately hospitalized in Naples, where his leg was set and put in a cast (R. 40–41). He was subse-

The district court awarded maintenance to petitioner in the amount of $644.16[5] and entered a decree for that sum against the general agent, American South African Line, Inc. (R. 109). The libel was dismissed as to the United States for want of proper venue, in that the ship was not present in the district when the libel was filed (R. 99). The general agent, American South African Line, Inc., was held answerable as the operator of the vessel under this Court's decision in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707 (R. 99–101).[6]

On the merits, the district court held that petitioner was not precluded from claiming maintenance by the mere fact that he was ashore for his own recreational purposes (R. 103–107). It held further that petitioner was "less sober than he says he was, but * * * not so under the influence of liquor as to be barred from recovery" (R. 108).[7] Finally, it described his action in going on the ledge as a "perilous undertaking" and that

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quently flown home and treated at the Jackson Memorial Hospital in Miami, the Stapleton Marine Hospital at Staten Island and the Detroit Marine Hospital (R. 40–44, 91a–91b). The transportation as well as the hospitalization and care were, of course, without cost to petitioner.

[5] This amount apparently represents a daily allowance for periods December 21, 1944, to February 27, 1945, and May 29, 1945, to July 1, 1945 (R. 55).

[6] This holding was affirmed on rehearing (R. 115–116).

[7] The record of the Army hospital in Naples, made at the time of petitioner's entrance, indicated acute alcoholism (R. 73).

in leaning over the edge as "even more perilous" (R. 102). It recognized that petitioner took only a "casual glance" at the rod on the wall, which looked like a "lightning arrester or something of that type," (R. 102). Nevertheless the Court held that petitioner's conduct fell short of the recklessness which would, under general admiralty law serve to bar his claim (R. 108–109).

An appeal was taken by the general agent from the decree entered against it by the district court (R. 125).[8] Petitioner cross-appealed from the decree which dismissed the libel as against the United States (R. 132–133). During the pendency of the appeal, this Court handed down its decision in *Fink* v. *Shepard SS Co.,* 337 U. S. 810, and, accordingly, the decree against the general agent was reversed by agreement of the parties (R. 138). The dismissal of the libel as against the United States on the ground of improper venue was also reversed (R. 138–139), and the court below proceeded to consider the case on the merits as against the United States.

The doctrine of *Aguilar* v. *Standard Oil Company,* 318 U. S. 724, was interpreted and applied as permitting recovery of maintenance and cure unless the seaman's injury resulted from his willful misbehavior or gross negligence (R. 139–140). After reviewing the facts, the court below concluded that petitioner's actions, in circumstances of danger, did not show "* * * even a minimal degree of regard for the consequences of his act" and, accordingly, found his claim to maintenance and cure barred by his own gross negligence (R. 139–141).

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[8] The general agent's brief urged three grounds for reversal: (1) that as general agent it was not liable for maintenance; (2) that a shipowner is not liable for maintenance where the seaman is injured while engaged in recreational activities; (3) that petitioner could not recover because injured as a result of his own gross negligence or indiscretion.

A petition for rehearing was filed which raised for the first time the contention that the liability of the United States for maintenance and cure was absolute by virtue of Article 2 of the Shipowners' Liability Convention, 1936, *supra,* pp. 3–4 (R. 151–153). The substance of petitioner's contention was that clause 1 of Article 2, placing liability for maintenance and cure on the shipowner, was in effect and binding, but that clause 2 of Article 2, permitting exceptions was not self-executing and, accordingly, not in effect (R. 152). Upon consideration of the petition for rehearing, the court below held, one judge dissenting, that Article 2, if self-executing, was in effect as a unit and required no legislation to make it operative (R. 154–157).

SUMMARY OF ARGUMENT

I

A. The Government is in accord with petitioner that Article 2, paragraph 1, of the Shipowners' Liability Convention is self-executing. Since the language of paragraph 1 provides a rule of decision which requires no implementing legislation, it has been uniformly construed by the executive departments as being fully in force.

B. We take issue, however, on the construction to be given paragraph 2. Petitioner asserts that the exceptions permitted by paragraph 2, which are declaratory of the general United States maritime law, can be made effective only by affirmative statutory enactment. We submit that this result was never intended. Basically, it is inconsistent with the general design of International Labor Conventions of leaving the method of application to national discretion. Moreover, it is refuted by the historical background of the Convention and its construction by the executive departments.

1. As a Memorandum prepared by the International Labor Office points out, "from an international point of view, what is essential is that the provisions of a Convention should be fully applied; in regard to the manner of application, both the Constitution of the Organisation and the terms of the individual Conventions deliberately leave a wide measure of discretion to each country." Consistent with this general purpose it has been commonly understood that after ratification of a Convention statutory implementation is not necessary to make its terms effective if existing legal principles or rules conform to the requirements of the Convention. Similarly, the international obligations of this Government are satisfied if the provisions of a Convention are

made effective as self-executing by virtue of our Constitution. Analysis of the Shipowners' Liability Convention demonstrates that, in accordance with the general design of International Labor Conventions, the details of the nature and the extent of the liability of shipowners are left to national discretion and that existing law remains unrepealed. This conclusion is strongly buttressed by the broad and comprehensive sweep of the expression "national laws and regulations." As the Memorandum of the International Labor Office notes, this expression has "unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion. * * * From an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law."

2. The historical background of the Convention reveals no intention to repeal existing legal principles which absolve the shipowner of liability where the seaman is at fault. Examination of the pertinent reports and records of the Convention discloses plainly that its general purpose is to achieve a certain measure of standardization internationally through an average formulation of

existing national law. Specifically, it is manifest from these reports and records that the exception based on the notion of fault represents an average solution in its formulation, which was deliberately introduced into the Convention because of the then existing state of national law.

3. Moreover, the construction of paragraph 2 for which petitioner here contends is in conflict with the construction given paragraph 2 by the executive departments contemporaneously with, and subsequent to, ratification of the Convention. The expressions of executive opinion in 1939 upon which petitioner relies can be reconciled with previous and subsequent executive expressions and actions only if read as having been uttered out of excess of caution and out of a desire to codify the maritime law in the field covered by the Convention in so far as the terms of the Convention left room for national discretion. But even if the 1939 statements are to be construed as petitioner construes them, the most that can be said is that the executive construction of paragraph 2 has been inconsistent. In such circumstances, this Court should adopt that construction which best harmonizes with the text and purposes of the Convention and with the understanding of it expressed by the I. L. O. itself.

II

A. The court below denied recovery of maintenance and cure on the ground that petitioner's conduct was in reckless disregard of his own safety. The standard thus applied is entirely in accord with this Court's pronouncements in *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, and the leading decisions in this field. Moreover, this standard is synonymous with the words "wilful act, default or misbehavior" used in paragraph 2. On their face, these words comprehend within their scope a deliberate act of indiscretion signified by a reckless disregard of safety; and examination of the pertinent reports and records of the Convention bears out this construction.

B. The record fully supports the unanimous judgment of the court below that petitioner did not "show even a minimal degree of regard for the consequences of his act." According to petitioner's own testimony, petitioner, although fully aware of the fact that he had been drinking, went out upon an unprotected ledge, 2 to 3 feet wide, which had a sheer drop of 30 to 35 feet. He stood there, about six inches from the edge of the ledge, for about three to five minutes, and then, although certainly cognizant of the fact that a fall would cause serious bodily injury, leaned over the edge and "somehow or other * * * took hold of this rod," which was like a "lightning arrester," without giving it more than just a "casual glance." We submit that such misconduct on petitioner's part falls well within the established meaning of conduct in reckless disregard of safety.

ARGUMENT

PRELIMINARY STATEMENT

In this proceeding, petitioner, a merchant seaman employed by the United States, seeks maintenance and cure for injuries received while on authorized shore leave in Italy in 1944. The court below denied recovery under the general maritime law because of petitioner's misconduct, and held that its decision is not affected by the terms of the Shipowners' Liability Convention (International Labor Convention 55).

Petitioner here asserts that the decision below is in error in two respects. First, he contends that paragraph 1 of Article 2 of the Convention is self-executing, and that a shipowner's duty thereunder to provide maintenance and cure is absolute in the absence of enactment of an implementing statute putting into force the exceptions permitted by paragraph 2 of Article 2. Secondly, and alternatively, petitioner contends that if paragraph 2 is operative, his conduct at the time he incurred the injury was not such as would defeat his claim to maintenance and cure under that paragraph or under the general maritime law.

It has apparently been assumed by this Court, without discussion of the problem, that the Convention is to some extent self-operative. See *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 42; *De Zon* v. *American President Lines*, 318 U. S. 660, 667, n. 3; *Farrell* v. *United States*, 336 U. S.

511, 517. The precise question here involved, however, was expressly left open by this Court's opinion in *Aguilar* v. *Standard Oil Co.* and *Waterman Steamship Corp* v. *Jones,* 318 U. S. 724. The issue in those cases was whether a shipowner is liable for wages and maintenance and cure to a seaman who, having left his vessel on authorized shore leave, is injured, without any misconduct on his part (p. 726), while traversing the only available route between the moored ship and a public street. In the *Aguilar* case, the injury occurred prior to the effective date of the Shipowners' Liability Convention; in the *Jones* case, the injury occurred subsequent to the effective date of the Convention. A majority of the Court held in the *Aguilar* case that, on the facts presented, the seaman was in the service of the ship at the time of the injury, and the shipowner, therefore, was liable for maintenance and cure under the principles of general maritime law. Accordingly, since the Convention, by its terms, effected no change in that liability in the absence of misconduct, the Court found it unnecessary, in so far as Jones' claim was concerned, to consider the possible application of the Convention (p. 737). In this connection, it should be noted that neither party in the *Jones* case raised or briefed the question of the Convention's effect upon the disposition of Jones' claim to maintenance and cure.

In a short memorandum opinion (p. 738), Mr. Chief Justice Stone dissented from the majority decision in the *Aguilar* case, taking the view that liability does not exist under general maritime law where a seaman leaves the ship on personal business. He concurred in the result in the *Jones* case "* * * on the ground that the recovery was authorized by the Shipowners' Liability Convention, 54 Stat. 1695, which became effective before the date of respondent's injury. He [was] of opinion that Article 2, Clause 1 of the treaty authorizing the recovery is self-executing, and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect. * * *."

Taking cognizance of this observation by the Chief Justice, a majority of the court below (Judges Swan and L. Hand) declared (R. 155-156):

> If it be assumed that Clause 1 of Article 2 is self-executing, there would seem to be equal reason to make the same assumption as to Clause 2, unless the phrase "national laws or regulations" must be interpreted to exclude decisional law and refer only to legislation. It is true that Chief Justice Stone in the *Aguilar* case, *supra,* after stating that the first clause of Article 2 is self-executing went on to say "and that the exceptions permitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect." This bald

> statement of opinion does not disclose any reasons in support of it, and despite the high regard we have for any utterance of Chief Justice Stone, independent examination of the question constrains us respectfully to disagree. * * * Our study of the Convention leads us to the conclusion that if Clause 1 of Article 2 is self-executing so also is Clause 2. If, on the other hand, Clause 1 of Article 2 is not self-executing the Convention does not apply. Either construction of Clause 1 leads to the conclusion that our decision is not affected by the terms of the Convention. * * *

Judge Frank, dissenting, stated, on the other hand, that (R. 157) "* * * the construction given by my colleagues seems to me to be unnecessarily complicated and insufficiently sustained by persuasive reasons to justify a disregard for Chief Justice Stone's views. * * *."

In this brief, we propose to show that there are sound and persuasive reasons to justify the rejection by the majority below of Chief Justice Stone's views as to the necessity for implementing legislation with respect to paragraph 2 of Article 2 of the Convention. We agree with the Chief Justice that paragraph 1 of Article 2 is self-executing,[9] but, as we shall demonstrate in

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[9] The defense of the proceedings below was handled by private counsel retained by the government agent. In protecting the interests of the agent, counsel argued in the court below, not only that the convention was merely declaratory

Part I of this brief, the language of the Convention, its historical background, and its construction by the executive departments of the Government[10] point to the conclusion that the exceptions permitted by paragraph 2 are presently operative by virtue of the general maritime law. We shall further show in Part II that petitioner's conduct at the time he sustained his injury was such as defeats his claim to maintenance and cure under the Convention and under the general maritime law.

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of the preexisting American law, but also that paragraph 1 is not self-executing. The Solicitor General believes that the argument thus made as to the non-self-executing character of the convention was in error.

[10] It is a familiar principle that "in ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it." *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–295; *Cook* v. *United States*, 288 U. S. 102, 112; *Nielsen* v. *Johnson*, 279 U. S. 47, 52. Compare Article 19 (a.) of the Draft Convention on the Law of Treaties prepared by the Research in International Law of the Harvard Law School, which states (29 Am. J. Int'l L. Supp. No. 4, pp. 937–971): "A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve."
See also Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 Harv. L. Rev. 549.

Before discussing these issues, however, we think it appropriate, in order that the historical background of the Convention may be seen in its proper context, to set forth briefly the nature of the International Labor Organization, the procedure by which International Labor Conventions are drafted and adopted, and the sequence of events leading to the Shipowners' Liability Convention.

1. *The International Labor Organization.*—(a) The establishment of the International Labor Organization (I. L. O.) was provided for in the treaties of peace negotiated at the end of World War I; its Constitution formed part XIII of the Treaty of Versailles of June 28, 1919, of the Treaty of St. Germain of September 10, 1919, of the Treaty of Trianon of June 4, 1920, and part XII of the Treaty of Neuilly of November 27, 1919.[11] Its purpose, as set forth in the preamble of the Constitution of the I. L. O., is to further the adoption of international regulations designed to achieve the extension of social security and welfare legislation.

Although Article 387 of the Constitution provided that "the original Members of the League of Nations shall be the original Members of this organization, and hereafter membership of the League of Nations shall carry with it membership of the said organization," the United States, without becoming a member of the League of Nations and without assuming any obligation under the Covenant of the League of Nations, became a member of the I. L. O. on August 20, 1934.[12]

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[11] This Constitution of the I. L. O. is reprinted in 30 Am. J. Int'l L. Supp. pp. 68–78. The origins of the I. L. O. are summarized in Dillon, *International Labor Conventions* (1942 ed.) pp. 1–11. A more detailed statement may be found in Shotwell (ed.), *The Origins of the International Labor Organization: The Paris Peace Conference—History and Documents* (2 Vol.) (1934).

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[12] United States Treaties, Treaty Series, No. 874. See also 30 Am. J. Int'l L. Supp. pp. 67–85.

As of 1949, the membership of the I. L. O. comprised the following countries.

Afghanistan
Albania
Argentine Republic
Australia
Austria
Belgium
Burma
Bolivia
Brazil
Bulgaria
Canada
Ceylon
Chile
China
Colombia
Costa Rica
Cuba
Czechoslovakia
Denmark
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
Finland
France
Greece
Guatemala
Haiti
Hungary
Iceland
India
Iran
Iraq
Ireland
Italy
Liberia
Luxembourg
Mexico
Netherlands
New Zealand
Norway
Pakistan
Panama
Peru
Philippines
Poland
Portugal
Sweden
Switzerland

Upon the establishment of the United Nations, the Constitution of the I. L. O. was amended in 1946[13] to make specific provision for relationship with the U. N. Pursuant to an agreement reached between the I. L. O. and the U. N., effective December 14, 1946, the U. N. recognized the I. L. O. as a "specialized agency" (in the technical meaning of the term as defined in Article 57 (2) of the U. N. Charter) "responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein."[14]

Syria
Thailand
Turkey
Union of South Africa
United Kingdom
United States of America
Uruguay
Venezuela
Yugoslavia

See United States Department of State Publication No. 3655, International Organization and Conference Series I, 8, *International Organizations in which the United States Participates* (1949), pp. 231–232.

[13] The instrument of amendment became effective April 20, 1948. See United States Department of State Publication No. 2851, *United States Treaty Developments* (June 1949), June 28, 1919. T. S. 874, p. 3. The text of the Constitution, as amended, is contained in the *Constitution and Rules of the International Labor Organization, Conference Edition*, International Labor Office, May 1948.

[14] See, Fried, *Relations Between the United Nations and the International Labor Organization*, 41 Am. Pol. Sci. Rev. 963, 971. The text of the agreement is contained in the *Official Bulletin*, International Labor Office, November 15, 1946, p. 292, and in the *Constitution and Rules of the International Labor Organization, Conference Edition*, International Labor Office, May 1948, p. 63.

(b) The I. L. O. functions through three organs: The General Conference of representatives of the Members, the Governing Body, and the International Labor Office, which is controlled by the Governing Body.

The General Conference, which meets ordinarily once a year, is the policy making body. It is composed of four representatives of each of the Members, of whom two are Government delegates and two are delegates representing, respectively, the employers and the workers of each of the Members. Each delegate is entitled to vote individually on all matters which are considered by the Conference.

The Governing Body serves as the executive council of the Organization. It consists of thirty-two persons—eight representing the workers, eight representing the employers and sixteen representing Governments. Of the sixteen persons representing Governments, eight are appointed by Members of major industrial importance, and eight are appointed by the Members selected for that purpose by the Government delegates to the Conference, excluding the delegates of the eight Members of chief industrial importance. Representatives of the employers and workers are elected respectively by the delegates of the employers and workers to the Conference. The period of office is three years.

The Governing Body meets four times a year, elects its own chairman and regulates its own procedure. Among its functions are the calling of the Conference and the determination of the items for the agenda. In addition, it determines the time, place, and agenda of regional conferences and committees, and supervises the work of these bodies. It also supervises the work of the International Labor Office and appoints its Director-General.

The International Labor Office is the permanent secretariat of the Governing Body and the General Conference. The Office prepares material for the use of the Governing Body and its committees and for the General Conference. In addition, it collects and publishes current information on labor and social questions throughout the world.

2. *The Procedure By Which International Labor Conventions Are Adopted.*—The agenda for all meetings of the Conference is initially settled by the Governing Body,[15] and is transmitted to the Member Nations by the Director-General who acts as Secretary-General of the Conference. By a two-thirds vote of the delegates present at the Conference, items of the agenda selected by the Governing Body may be excluded from the agenda. In addition, the Conference, by

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[15] The method of voting for placing items on the agenda is set forth in the Standing Orders of each International Labor Conference. See *e. g.*, *Constitution and Rules of the International Labor Conference, Conference Edition*, International Labor Office, May 1948, pp. 43–44.

two-thirds vote of the delegates present, may select subjects to be included in the agenda for the following meeting.

Conventions are adopted through either a "single-discussion" or a "double-discussion" procedure.[16] Under the "single-discussion" procedure, the International Labor Office communicates to each Member Government a summary report upon the question for discussion, containing a statement of the law and practice in the different countries (Grey Report), accompanied by a questionnaire drawn up with a view to the preparation of Conventions or Recommendations (Red Report).[17] On the basis of the replies received, the Office draws up a final report containing one or more Draft Conventions or Recommendations (Blue Report). This report is the basis for discussion at the Conference. Under the "double-discussion" procedure, the Office similarly prepares a preliminary report (Grey Report) containing a statement of the law and practice in the different countries and a list of proposed points for discussion. A preparatory discussion is then had at the Conference. If the Conference decides that the matter is suitable to form the subject of Conventions or Recommendations, it adopts draft conclusions, and may decide either that the question shall be included in the agenda of the following session or ask the Governing Body to include the question in the agenda at a later session. Following the adoption of draft conclusions, the Office prepares a questionnaire (Red Report). From the replies received, the Office prepares a proposed Draft Convention or Recomendation which reflects the average point of view expressed. This report (Blue Report) is the basis for final discussion in the Conference.

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[16] See Articles 36–37 of the Standing Orders of the International Labor Conference, *id.* at pp. 44–47. See also Dillon, *op. cit. supra* at pp. 11–15.

[17] A Conference may result in a Convention or a Recommendation. A Recommendation differs from a Convention in that it entails no substantive international obligations or rights. See Article 19 (6) of the I. L. O. Constitution.

The actual work at the Conference is done to a large extent by Conference Committees. The representation of the three groups in the Conference (Members, employers, and workers) is equally divided on the committees. Members of a committee may suggest amendments to the report, but a new report may not be proposed. The procedure in committee consists of proposals, and debates on these proposals, until an agreement is reached. In some instances, minority reports are filed. The conclusions reached by the committees are then presented to the Conference by their Reporters and are discussed first in general and then in detail. Frequently, amendments are proposed and voted on and a preliminary record vote taken. If, on a final discussion of a Draft Convention, a majority is procured, the provisional text is referred to the Drafting Committee. When this committee reports back to the Conference, a vote is taken on the rejection or adoption of the Convention. On this vote, a two-thirds majority is required.[18]

Following adoption by the Conference, two copies of the Convention are authenticated by the signatures of the President of the Conference and of the Director-General. One copy is deposited in the archives of the Office and the other with the Secretary-General of the United Nations. A certified copy is transmitted by the Director-General to each of the Members.

Each of the Members undertakes that it will, within the period of one year from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so, then at the earliest practicable moment and in no case later than eighteen months after the closing of the session, bring the Convention before the authority or authorities within whose competence the matter lies, for legislative or other action. If the Member obtains the consent of the authority or authorities within whose competence the matter lies, it communicates formal ratifiction of the Convention to the Director-General and is obligated to take such action as may be necessary to make effective the provisions of the Convention.[19] As soon as a certain number of ratifications (usually two) have been obtained, the draft becomes a Convention in the strict sense of the term but is binding only on the ratifying Members.[20]

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[18] Should any Convention fail to secure the support of two-thirds of the votes cast by the delegates present, Members, although under no duty to submit the Convention to the appropriate authorities for approval, ratification and implementation have, of course, the right to agree to the Convention among themselves.

3. *The Shipowners' Liability Convention.*[21]—(a) The "double-discussion procedure described above, pp. 23–25, was employed in the adoption of the Shipowners' Liability Convention. In accordance with the decision reached by the Governing Body at its Thirty-Fifth Session (Geneva, January 1927), the question of the protection of seamen in case of injury was placed on the agenda of the Thirteenth Session of the General Conference. In preparation for this session, the International Labor Office prepared a "Grey Report"

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[19] See Article 19 of the I. L. O. Constitution.

[20] See 5 Hackworth, *Digest of International Law* (1943 ed.) pp. 30–31.

[21] To date, ninety-eight Draft Conventions have been adopted at sessions of the International Labor Conference. As of September 30, 1949, fifty-six have been ratified and come into force. See International Labour Conference (1949), *Conventions and Recommendations: 1919–1949*, p. iii. The United States has ratified five Conventions, all of which relate to maritime matters. They are as follows: No. 53, Officers' competency certificates (54 Stat. 1683); No. 54, Annual holidays with pay for seamen; No. 55, Shipowners liability (54 Stat. 1693); No. 57, Hours of work on board ship and manning; and No. 58, Minimum age for admission of children to employment at sea (revised) (54 Stat. 1705). Conventions 54 and 57 have not yet come into force. See United States Treaty Developments, *op. cit. supra* at pp. 5–8.

analyzing the national laws then prevailing in the member nations and suggested a number of points on which the Conference might deem it desirable for the Office to consult the member Governments.[22]

At the Thirteenth Session of the Conference (Geneva 1929), the proposed points for discussion submitted by the Office[23] were debated and some amendments adopted.[24] The Conference then adopted draft conclusions and placed the question on the agenda for a second discussion. Following the Conference, a questionnaire was prepared by the Office and forwarded to the Governments in November 1929 (Red Report).[25] On the basis of the replies received, the Office reported out a proposed Draft Convention (Blue Report).[26]

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[22] See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen On Board Ship, First Discussion.*

[23] The proposed draft conclusions of the Office are set forth in International Labor Conference, *Proceedings*, *Thirteenth Session* (1929), p. 348 ff.

[24] *Id.*, at pp. 131–142, 348–381.

[25] It should be noted in this connection that, since the United States did not become a member of the I. L. O. until 1934, it did not participate in the Thirteenth Session of the Conference, nor did it receive a questionnaire. The "Grey Report" did, however, include the United States in its analysis of the existing law.

[26] See International Labor Conference (1931), *The Protection of Seamen In Case of Sickness, Including the Treatment of Seamen Injured On Board Ship, Second Discussion* (Report II). This "Blue Report" contains the questions asked as well as the replies thereto.

The second discussion of the question took place at the Twenty-First Session of the Conference in 1936. The draft Convention proposed by the Office was amended by the Conference in several respects and finally adopted by a vote of 70 to 14.[27]

(b) On August 19, 1937, the Draft Convention (No. 55) was transmitted to the United States Senate by the President. 81 Cong. Rec. 9347.[28] The Senate Committee on Foreign Relations, without holding hearings, reported the Convention out on May 2, 1938, with the recommendation that it be ratified, subject to certain understandings not here pertinent. Sen. Exec. Rept. 8, 75th Cong., 3d Sess.; 83 Cong. Rec. 6046. The Convention was consented to by the Senate without debate on June 13, 1938 (83 Cong. Rec. 9028–9030), and was ratified by the President on August 15, 1938. 54 Stat. 1693.

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[27] See International Labor Conference, *Proceedings, Twenty-First Session* (1936). The report of the Committee on the protection of seamen in case of sickness or injury is found at pp. 247–258; the debates of the Conference are contained in pp. 72–84; and the final text of the Draft Convention appears at pp. 327–334. All four delegates from the United States voted for the adoption of the Convention (p. 171). The names of the United States delegates and advisers are set forth on p. 3.

[28] Accompanying the President's transmittal were reports from the interested Government Departments—State, Commerce, Labor, and the Maritime Commission—expressing their views. See Sen. Exec. Rept. 8, 75th Cong., 3d Sess., pp. 5–20. Sen. Exec. Rept. 8 also contains a report on the Twenty-First Session of the Conference by the United States delegates thereto (pp. 10–15).

On October 29, 1938, this country's ratification was registered with the Secretary-General of the League of Nations, in accordance with Article 405 (4) of the original I. L. O. Constitution. A prior ratification by Belgium was registered on November 4, 1938, and pursuant to Article 15 (2) of the Convention, which provides that it shall come into force twelve months after the date on which the ratifications of two members have been registered, the Convention became effective on October 29, 1939. It was so proclaimed by the President on that date. 54 Stat. 1693–1704. To date, the Convention has been ratified by five countries: Belgium, Bulgaria, France, Mexico, and the United States.[29]

(c) Following ratification, a bill was introduced on June 16, 1939, to implement the Convention. H. R. 6881, 76th Cong., 1st Sess., 84 Cong. Rec. 7392. The bill was drafted by an interdepartmental committee representing the Departments of State, Commerce, Justice, Labor, and Treasury, the Maritime Commission, Maritime Labor Board, Social Security Board and the United States Employee's Compensation Commission.[30] Hearings were held before the House Committee on Merchant Marine and Fisheries in July 1939,[31] and the bill was reported out favorably with amendments. H. Rept. 1328, 76th Cong., 1st Sess.; 84 Cong. Rec. 10129. It was passed without debate by the House of Representatives. 84 Cong. Rec. 10540. Hearings were then held before a subcommittee of the Senate Committee on Commerce in July 1940.[32] However, the Committee Print under consideration was not the bill as received from the House, but a bill revised by the subcommittee to incorporate provisions applying the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901–950) to seamen.[33] So revised, the bill was opposed by seamen's representatives;[34] and as a result of that opposition, the bill was tabled by the subcommittee.[35] A bill identical to H. R. 6881 as it had passed the House, in the 76th Congress, was reintroduced in the House on January 3, 1941. H. R. 557, 77th Cong., 1st Sess., 87 Cong. Rec. 15. No action was taken on it by the House Committee on Merchant Marine and Fisheries, and no further legislative action has been taken to implement the Convention.

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[29] See International Labor Conference, Thirty-Third Session (1950), Report III (Part I), *Summary Of Reports On Ratified Conventions*, p. 240.

[30] H. Rept. 1328, 76th Cong., 1st Sess., p. 49.

[31] Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 6726 and H. R. 6881, 76th Cong., 1st Sess.

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[32] Hearings before the Subcommittee of the Committee on Commerce, United States Senate, on H. R. 6881, 76th Cong., 3d Sess.

[33] *Id.* at pp. 1–8.

[34] *Id. passim.*

[35] Subsequently, on September 12, 1940, the Senate agreed to a Resolution referring the question of workmen's compensation for seamen to the interested Government agencies for investigation. S. Res. 299, 76th Cong., 3d Sess., 86 Cong. Rec. 12002. The agencies' report pursuant thereto was transmitted to the Senate on September 17, 1941, and referred to the Committee on Commerce. S. Doc. 113, 77th Cong., 1st Sess., 87 Cong. Rec. 7434. No further action was taken.

I

ARTICLE 2 OF THE SHIPOWNERS' LIABILITY CONVENTION IS EFFECTIVE ALTHOUGH IMPLEMENTING LEGISLATION HAS NOT BEEN ENACTED

A. PARAGRAPH 1 OF ARTICLE 2 IS SELF-EXECUTING

At the outset, we wish to reiterate that petitioner and the Government are fully in accord on the proposition that Article 2, paragraph 1, of the Shipowners' Liability Convention is self-executing. The governing principle of construction is well-settled. "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." *Foster* v. *Neilson,* 2 Pet. 253, 314. "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *Head Money Cases,* 112 U. S. 580, 598–599. See also *Dainese* v. *Hale,* 91 U. S. 13, 18; *United States* v. *Rauscher,* 119 U. S. 407, 418–419; *Valentine* v. *United States ex rel. Neidecker,* 299 U. S. 5, 10–11; *Bacardi Corp.* v. *Domenech,* 311 U. S. 150, 161.

Applying this principle to Article 2, paragraph 1, there can be no doubt that that provision is self-executing. Plainly, no legislation is required to make effective the command of that paragraph that:

> The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement; * * *

In clear and concise language, paragraph 1 lays down a rule of law which determines the rights and duties of seamen and shipowners.[36] Legislation by Congress could do no more than enact its terms verbatim.

It is readily apparent, therefore, why this Court has, in prior cases which did not directly raise the question, assumed, without discussion, that the Convention is self-executing in part. See *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, 42; *De Zon* v. *American President Lines,* 318 U. S. 660, 667, n. 3; *Farrell* v. *United States,* 336 U. S. 511, 517. See also the concurring opinion of Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones,* 318 U. S. 724, 738.

Similarly, the executive branch of the Government has proceeded on the belief that the Convention is self-operating in part. As we have already noted above, pp. 29–31, following ratification of the Convention on August 15, 1938, but prior to its effective date, a proposed bill to implement the Convention was submitted to Congress by the executive branch. H. R. 6881, 76th Cong., 1st sess. Explaining the desirability of implementing legislation, Secretary of State Hull stated in a letter accompanying the draft bill (H. Rept. 1328, 76th Cong., 1st sess., p. 6):

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[36] The nature and extent of the liability are further defined by Articles 1 to 12. See *infra,* pp. 47–51.

> Many of the provisions of the convention are considered to be self-executing, and there would appear to be no need to repeat verbatim the language of the convention in a statute to make it effective. Some of the articles of the convention, however, after stating the general rule, provide that national laws may make specified exceptions thereto. If this Government is to be excepted from certain obligations of the convention or alterations in our present practice, it is necessary to do so affirmatively by statute.

As drafted, H. R. 6881 did not "repeat verbatim the language of the convention": In particular, it contained no language enacting into statutory law the provisions of paragraph 1 of Article 2 of the Convention (*id.* at pp. 38–39). Justifying this omission, Secretary of State Hull observed that "Paragraph 1 of article 2 of the convention was not incorporated in the bill because of the belief (1) that it is self-executing in that it establishes liability, although no definite amount is provided; and (2) that it will not be held by the courts to conflict with present law in this country." (*Id.* at p. 6).

This construction of the Convention embodied in H. R. 6881 reflected the views of an interdepartmental committee, consisting of representatives of the Departments of State, Commerce, Justice, Labor, and Treasury, the Maritime Commission, the Maritime Labor Board, the Social Security Board, and the United States Employee's Compensation Commission, which drafted the bill (*id.* at 49). In their comments on the bill, the Secretary of Labor, and the Chairman of the Maritime Commission likewise stated that certain provisions of the Convention were deemed to be self-executing. (*Id.* at pp. 31–32, 48–49.)

It should be noted in this connection that the House Committee on Merchant Marine and Fisheries, in its report on H. R. 6881, declared that it would not "* * * undertake to say that the convention or any part thereof is self-executing. * * *" and that it would not "* * * concede that any part of the draft convention is self-executing." (*Id.* at pp. 2, 3, 4.) Although the House Committee thus expressed no views on the question, it recognized that the Convention might be effective in part without implementing legislation and recommended enactment of the bill "* * * to the end that the extent of the obligations may be certain and fixed." (*Id.* at p. 4.) As already indicated above, pp. 29–

31, the bill failed of enactment for reasons not here pertinent.

Following submission of the proposed bill to Congress, the President, on October 29, 1939, proclaimed the Convention to be in force (54 Stat. 1693–1704). The proclamation, in accord with the executive construction of the Convention, declared the Convention to be self-executing in part. It states that the President has (54 Stat. 1704):

> * * * caused the said convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled in good faith by the United States of America and the citizens thereof, on and from October 29, 1939, subject to the understandings above recited and to any exceptions and any limitations of liability in accordance with the provisions of the convention which may be made by legislation or regulations on part of the United States of America. * * *

Since 1939, the executive departments have consistently maintained the position that the Convention is self-executing in part. In *Farrell* v. *United States*, 336 U. S. 511, which involved the question whether a seaman who has already received the maximum cure that medical and surgical aid may accomplish is entitled to receive maintenance and cure indefinitely, the Government relied, in part, upon Article 4, paragraph 1, of the Convention and contended that it is self-executing. (See Brief for the United States, p. 18, n. 8, in No. 267, October Term, 1948.) This Court's acceptance of the Government's position as to Article 4 (336 U. S. 511, 517, 524, n. 4) is, we believe, significant in interpreting Article 2, paragraph 1. Article 4, paragraph 1, provides that:

> The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

Since this provision merely defines the extent of the liability which is imposed by Article 2, paragraph 1, it is obvious that if Article 4, paragraph 1, is self-executing, Article 2, paragraph 1, must also be self-executing.

This construction has further been manifested in the annual reports made by the United States to the International Labor Office on the measures which it has taken to give effect to the provisions of the Convention.[37] Although noting that this Court has never finally determined the point, the reports are made on the assumption that the Convention is, in fact, self-executing in part.[38] Indeed, a contrary position would constitute an admission by this Government that it has been in default since 1939 on its obligation under Article 19 (5) of the Constitution of the I. L. O. to "* * * take such action as may be necessary to make effective the provisions of such Convention; * * *," for no steps have been taken subsequent to the failure of enactment of H. R. 6881 to procure implementing legislation.

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[37] Article 22 of the Constitution of the I. L. O. provides as follows:

"Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

We submit, therefore, in view of the fact that Article 2, paragraph 1, plainly creates a rule of decision which requires no implementing legislation and in the light of executive construction which is entitled to great weight,[39] there can be no question that Article 2, paragraph 1, is self-executing.[40]

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[38] See *e. g.*, *passim*, the report for the period July 1, 1949, to June 30, 1950, which is reprinted in the Appendix, pp. 115–137. These annual reports are prepared by the Department of Labor in consultation with the Government departments and agencies concerned. Copies are circulated annually to the United States Chamber of Commerce, the National Association of Manufacturers and the American Federation of Labor in accordance with Article 23 of the Constitution of the I. L. O. A copy of the Form approved by the Governing Body of the I. L. O. for use in drafting reports appears in the Appendix, pp. 103–114.

[39] Cf. *Factor* v. *Laubenheimer*, 290 U. S. 276, 295–298; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Charlton* v. *Kelly*, 229 U. S. 447, 468.

[40] Although the issue of whether a treaty, or a part thereof, is self-operative is a matter of municipal, not international, law, it is pertinent to observe that the Constitution of the I. L. O. and the terms of the individual Conventions permit,

B. THE EXCEPTIONS PERMITTED BY PARAGRAPH 2 ARE OPERATIVE BY VIRTUE OF THE GENERAL MARITIME LAW

Although we believe that the judicial and executive construction of the Convention to which we have adverted compel the conclusion that paragraph 1 of Article 2 is self-executing, it by no means follows that paragraph 2 of Article 2 is inoperative in the absence of an implementing statute. Petitioner refers in this connection to the concurring opinion of Mr. Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones, supra,* and to the construction supposedly given to paragraph 2 by the executive departments in connection with H. R. 6881. As the majority opinion of the court below pointed out, the three sentence memorandum of Mr. Chief Justice Stone contains no discussion of the text or history of the Convention but rests solely on the comments of Secretary of State Hull quoted in H. Rept. 1328, 76th Cong., 1st sess. (*supra,* p. 33). As we shall show, *infra,* pp. 60–66, petitioner's reliance on Secretary Hull's statement is misplaced. Moreover, there are sound and persuasive reasons, which find support in the general design of International Labor Conventions, in the aims of the Shipowners' Liability Convention, and its historical background, sustaining the interpretation

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and indeed contemplate, that Conventions may be made effective as self-executory under the constitution or general law of the country concerned. See memorandum of the Director-General of the International Labor Office, Appendix, pp. 98–102.

placed by a majority of the court below on paragraph 2.

As the majority opinion points out (R. 155–156), "when the Convention was proclaimed to be effective, the existing maritime law of the United States recognized not only the shipowner's duty to pay maintenance and cure but also exceptions to that duty in case the seaman's injury or sickness was due to his own 'wilful act, default or misbehavior' or in case he 'intentionally concealed' sickness or infirmity existing when he signed the ship's articles." See *Aguilar* v. *Standard Oil Co., supra; **Miller*** v. ***Lykes Bros.—Ripley S. S. Co. Inc.,*** 98 F. 2d 185 (C. A. 5), certiorari denied, 305 U. S. 641. Thus, Article 2 of the Convention is simply declaratory of our general maritime law. Paragraph 1 recognizes the traditional liability of a shipowner for maintenance and cure and defines the period during which that liability may arise, and paragraph 2 specifies only the exceptions which the courts in this country have long permitted.[41] Similarly, the "Grey Report" discloses that Article 2 is declaratory of the law of other members of the I. L. O. as well. See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen In Case of Sickness, Including the Treatment of Seamen Injured On Board Ship, First Discussion,* pp. 37–45. If petitioner be correct in his contention that paragraph 2 is inoperative, it would mean that the International Labor Conference which adopted the Convention intended that part of the existing law was to continue and part was to be repealed, no matter how long the repealed part had been the settled policy of the individual nation; and that to reestablish that policy the nation must take affirmative action by adopting a new statute or regulation. We submit that this result was never intended. It is basically inconsistent with the general design of International Labor Conventions of leaving the method of application of the principles adopted to national discretion. Moreover, it is refuted by the historical background of the Convention and the construction which has been accorded the Convention by this Government.

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[41] See *Jordine* v. *Walling* (C. A. 3), *infra*, note 54, p. 62. Likewise, Article 4, paragraph 1, which imposes liability for maintenance and cure until the seaman has been cured or the sickness or incapacity has been declared of a permanent character, is merely declaratory of the general maritime law. See *Farrell* v. *United States*, 336 U. S. 511, 517, 524.

1. *International Labor Conventions are Designed to Leave Room for National Discretion as to the Manner in which they are to be Applied and made Effective.*—Apart from the fact that the narrow construction of the expression "national laws or regulations" for which petitioner here contends finds no support in the historical background of the Convention, we think it significant that a restrictive reading of those words would defeat the flexibility of application which was in-

tended, to be available to the member nations. On this point, an advisory opinion of the International Labor Office, given in reply to an inquiry of the Solicitor General, is illuminating.[42] As to the meaning of "national laws or regulations," the Office observes that (Appendix, pp. 101-102):[43]

> * * * No record has been found of any case in which it has been necessary for the International Labour Organisation to express an opinion on the question whether

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[42] The letter of Solicitor General, dated October 27, 1950, after setting forth the provisions of Article 2, makes the following inquiry (Appendix, pp. 97-98):

"* * * We would appreciate being advised whether the International Labor Office considers these clauses to be self-executing or whether implementing legislation is required to give them effect. In particular, we are interested in ascertaining whether the International Labor Office construes the language 'national laws or regulations' as having reference solely to statutes or whether that language includes, as well, the principles of general maritime law enunciated and enforced by the courts. In this connection, your attention is called to the authentic French text which employs the term 'legislation nationale' * * *."

[43] It should be noted that the International Labor Office has no express authority under the Constitution of the I. L. O. to interpret the provisions of a Convention, such authority being reserved to the International Court of Justice (Art. 31, 37). But as a practical matter, such interpretations by the Office have been sanctioned by the I. L. O. See Dillon, *op. cit. supra* at pp. 15-16, 135-149. The Office's memorandum states that the observations therein made may "be of assistance in evaluating the view which the International Labour Conference, to which, under the Constitution of the Organisation, reports concerning the application of Conventions by Members which have ratified them are furnished each year, would be likely to take of the questions raised by the present case."

the term "national laws or regulations" which is frequently included in International Labour Conventions refers solely to statutes or can be regarded as also including the principles of general maritime law. The expression has, however, unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion and it would appear to be consistent with this general purpose to interpret the provision as allowing each party to the Convention to make the exceptions provided for either by specific enactment or by the application of some existing legal principle or rule. The term "national laws or regulations", without explicitly stating this conception, would not appear to be inconsistent with it, and the French term "*legislation nationale*" is, if anything, of a more general and comprehensive character and includes not merely legislation in the narrowest technical sense, but other forms of legal prescription including decrees, ordinances of various types and, when applicable, principles of customary law. It is, of course, for the courts of each country to decide what effect the incorporation of the terms of the Convention in national law as the direct result of ratification, by specific statutory enactment, or otherwise, may have had, but *from an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of*

> *Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law.* [Emphasis added.] [44]

* * * * *

As this opinion reveals, International Labor Conventions are designed so as to leave room for national discretion. Since it was common knowledge that the various member nations have different systems of law and different methods of enforcement, it was scarcely to be expected that the rights and duties formulated in the various Conventions would be applied and enforced uniformly under one form of legal command. The history of the I. L. O. is barren of any information which might suggest that the I. L O. was concerned with the form of the measures taken by the individual nations to make effective the terms of the Convention to which they were parties. The provisions of the Constitution of the I. L. O. make it clear that the I. L. O. is interested primarily in insuring that the terms of the Convention are made effective.[45]

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[44] As this opini[illegible]oints out, the question whether paragraph 2 is self-executing is, analytically, a question of municipal, not international, law. It is a question, however, which must in many instances be resolved by reference to international sources and standards. If a treaty prescribes a rule by which individual rights may be judicially determined, our Constitution makes that rule a rule of decision (Article VI, Clause 2; see cases cited *supra*, p. 31). But whether the terms of the treaty lay down such a rule, or merely import an international obligation of the sovereign contracting parties to take such action as may be municipally necessary to effect the object to be accomplished, is a question which turns in major part on the language of the treaty and the intention of the contracting nations. Cf. *Foster* v. *Neilson*, 2 Pet. 253, 314–315. And this is particularly true where the question at issue concerns the intention of the treaty to abrogate an existing settled rule of domestic law. Accordingly, in construing the language of a treaty, it would seem at least equally relevant to inquire into the definition which may have been given to the language as a matter of international law or usage as into the meaning which is domestically ascribed to those words. Such an inquiry is particularly pertinent where, as here, the term "national laws or regulations" has been frequently employed in International Labor Conventions as a phrase of art.

Consistent with this general purpose, it has been commonly understood that legislation need not be enacted after the ratification of a Convention to make its terms effective if existing legal principles or rules conform to the requirements of the Convention. Thus, in several instances, other nations have found it unnecessary to do more than enact supplementary legislation or to issue supplementary administrative decrees or regulations after ratification of Conventions. In one case, the international obligations arising from ratification were deemed fully met by existing social legislation. See Dillon, *op. cit. supra* at pp. 167--171.

Similarly, the international obligations of this Government are satisfied if the provisions of a Convention are made effective as self-executing by virtue of our Constitution. In this respect, the International Labor Office advises (Appendix, pp. 100–101):

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[45] See Articles 22, 23, 26, 29, 33, 37.

> 3. * * * As the extent to which the provisions of an international Convention are self-executory differs considerably under the constitutional law of different countries, no uniformity in the matter has been, or is likely to be, practicable. The International Labour Organisation has been concerned to satisfy itself that, in cases in which no legislation which clearly implements the provisions of a Convention has been enacted, the Convention is effectively self-executory under the constitution or general law of the country concerned * * *. Subject to their being satisfied on this point, the competent bodies of the International Labour Organisation have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organisation in the light of its constitutional practice and its existing law.
>
> 4. From an international point of view, what is essential is that the provisions of a Convention should be fully applied; in regard to the manner of application, both the Constitution of the Organisation and the terms of the individual Conventions deliberately leave a wide measure of discretion to each country; it has frequently been

> pointed out that so many of the Conventions require detailed national regulations, administrative arrangements or provisions for inspection, penalties and other means of enforcement, that some legislation will, in most cases, be necessary to make the provisions of a Convention effective; but the criterion is solely whether or not the provisions of a Convention *can* be made fully effective on a self-executory basis.

Recognizing that the several Governments employ different methods to apply and enforce the provisions of International Labor Conventions, the Governing Body has approved Forms for Annual Reports which are specifically designed to elucidate this point. The standard question, asked as to all Conventions,[46] is as follows:[47]

> Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, *etc.*, to the International Labour Office with this report.
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> Where, notwithstanding the obligations resulting from the act of ratification, national law is not already in complete harmony with the provisions of the Convention, please indicate (a) to what extent

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[46] See International Labour Conference, Thirty-third Session (Geneva, 1950), Report III (Part IV), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, p. 12.

[47] See *e. g.*, Question I of the Form for Annual Reports on Convention 55, Appendix, p. 104.

> the ratification has modified previously existing law, and (b) what steps have been taken to ensure the observance of the provisions of the Convention. [Emphasis added.]

Drafted to elicit information as to whether the terms of the Convention are being applied, this question clearly indicates that the manner of application is regarded as dependent upon national judgment.

Examination of the provisions of the Shipowners' Liability Convention demonstrates the correctness of the foregoing observations. By its terms, the Convention discloses that the details of the nature and extent of the liability of shipowners are left to national discretion and that existing law, whether statutory or decisional, remains unrepealed.

The provisions of the Convention here pertinent are contained in Articles 1 through 12, which define the persons covered, the risks covered, the benefits granted, and which provide for the settlement of disputes. With reference to the scope of the Convention, Article 1 declares generally that it applies to "all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation." It further provides, however, that national laws or regulations may except persons employed on board vessels of certain enumerated classifications, persons employed on board by an employer other than the shipowner, longshoremen, pilots, and members of the shipowner's family.

As to the risks covered, Article 2 provides generally that the shipowner shall be liable for sickness and injury occurring during the period covered by the shipping articles and for death resulting from such sickness or injury. Here again, it is further provided that national laws or regulations may make exceptions in respect of injury not incurred in the service of the ship; injury or sickness due to the wilful act, default or misbehavior of the seaman; sickness or infirmity intentionally concealed when the shipping articles are signed; and sickness, or death directly attributable to sickness, if the seam~~e~~an refused to be medically examined at the time of the engagement.

The benefits granted comprise maintenance and cure, payment of wages, repatriation expenses, burial expenses, and the safeguarding of property left on board by sick, injured or deceased seamen. As to maintenance and cure, Article 3 states generally that the seaman is entitled to medical treatment, to be supplied proper and sufficient medicines and therapeutical applicances, and board and lodging. It does not, however, define the cost of board and lodging.[48] The duration of the shipowner's liability for maintenance and cure is declared by Article 4 to extend to that time when the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character, but national laws or regulations may limit such liability to a period not less than sixteen weeks from the day of the injury or the commencement of the sickness. Article 4 further states that if the vessel is registered in a territory which has a workmen's compensation or sickness insurance system, national laws or regulations may provide that the liability of the shipowner shall cease at the time the seaman becomes entitled to benefits under the scheme. In addition, Article 10 exempts the shipowner from any liability under Article 4 insofar as it is assumed by the public authorities.

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[48] In the United States, the cost of the seaman's maintenance is fixed by contract between the shipowners and the maritime unions. As of November 1949, the sum was fixed at $6 per day. See 4 National Association of Claimants' Compensation Attorneys Law Journal 232.

As to wages, Article 5 imposes liability for the payment of full wages so long as the sick or injured seaman remains on board, and, if the seaman has dependents, for the payment of wages in whole or in part, as prescribed by national laws or regulations, from the time he is landed until he has been cured or the sickness or incapacity is declared permanent. In addition, national laws or regulations may limit this liability, as to seamen no longer on board, to a period not less than sixteen weeks from the day of the injury or the commencement of the sickness. Both Articles 4 and 5 further provide that the liability to pay wages may be terminated by national laws or regulations when the seaman becomes entitled to cash benefits under a compulsory insurance or compensation scheme, if such is in force.

Article 6 makes the shipowner liable for the expenses of repatriating every sick or injured seaman who is landed during the voyage because of sickness or injury, and designates the port to which he is to be returned. Article 10, however, provides that the shipowner may be exempted from this liability insofar as it is assumed by the public authorities.

Article 7 provides that the shipowner shall be liable to defray burial expenses in case of death occuring on board, or in case of death occurring on shore if at the time of death the deceased was entitled to maintenance and cure. Liability under Article 7 is thus predicated upon the existence of liability under Article 2, which in turn depends upon the pertinent national laws or regulations. Article 7 further states that national laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefits are payable in respect of the deceased under laws or regulations relating to social insurance or workmen's compensation. In addition, as to this liability also, Article 10 provides that the shipowner may be exempted insofar as such liability is assumed by the public authorities.

Finally, rounding out the foregoing grants of benefits, Article 8 declares that national laws or regulations shall require the shipowner to take measures for safeguarding property left on board by sick, injured or deceased seamen.

To implement these benefits, Article 9 states that national laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes arising under the Convention; Article 11 announces that the Convention and national laws or regulations relating to benefits under the Convention shall be interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race; and Article 12 provides that "Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided for by this Convention."[49]

These provisions of the Convention speak for themselves; the Convention merely lays down fundamental principles and leaves the details of their application to national discretion.[50] Moreover, it is evident from Articles 4, 5, 7, and 12 that existing statutory and decisional law remains unrepealed. In the language of the majority opinion below (R. 156):

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[49] The principle of construction thus provided by Article 12 is also set forth in Article 19 (8) of the Constitution of the I. L. O.

[50] In this connection, it is to be noted that several of the member nations stated, in response to the questionnaire circulated by the International Labor Office in 1929, that they supported the advisability of a Convention in this field if the Convention were to be drafted so as to allow sufficient margin for national discretion. See International Labor Conference

> * * * Clause 3 of Article 4 [and paragraphs 3 and 2 of Articles 5 and 7 respectively] provides that if there is "in force" in the territory in which the vessel is registered, "a scheme applying to seamen of compulsory sickness insurance," etc., such "scheme" will modify the general rule of liability declared by paragraph 1 of Article[s] 4 [5, and 7]. In other words, it does not require legislation to make effective exceptions to the general rule if a "scheme" is already "in force." It is true that the language of Clause 3 of Article 4—"national laws or regulations may provide"—is not precisely the same as in Clause 2 of Article 2, "national laws or regulations may make exceptions in respect of." But in substance we think it is the same. Article 12 also indicates that not all existing decisional law is to be repealed. * * *

The conclusion drawn by the majority below from its analysis of the terms of the Convention that paragraph 2 of Article 2 permits exceptions to be made effective by virtue of existing decisional law is strongly buttressed by the broad

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(Geneva 1931), *The Protection of Seamen in case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II), pp. 5–8.

and comprehensive sweep of the expression "national laws or regulations."

Comparison of the English and French texts of the Convention is instructive on this point.[51] The provision that "national laws or regulations may make exceptions" appears in the French text as "la législation nationale peut prévoir des exceptions." "Législation nationale" includes, as the International Labor Office points out (*supra*, pp. 41–43), "* * * not merely legislation in the narrowest technical sense, but other forms of legal prescription including decrees, ordinances of various types and, when applicable, principles of customary law."[52] Similarly, in

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[51] Article 20 of the Convention provides that the French and English texts shall both be authentic (see Appendix, p. 94).

[52] "Législation [syon] n. f. (dû lat. *lex*, *legis*, loi et *latus*, porté). Droit de faire les lois. Corps du lois d'un pays: *la législation francais á été profondément remaniée apres la Révolution.* Science des lois: *cours de legislation.* Ensemble des lois qui régissent une matière: *la législation des accidents de travail.*" See 2 Nouveau Larousse Universel (1949 ed.) p. 36.

That the choice of the word "législation" was a deliberate one, evidencing an intention to permit the full exercise of national discretion as to the manner in which exceptions can be made, becomes apparent when Article 2 is compared with Article 12. Whereas the English text of Article 12 declares that "Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions * * *," the French text reads "Rien dans la présente convention n'affecte toute loi, toute sentence, toute coutume ou tout accord * * *." The use of the word "loi" in this context signifies, we believe, Anglo-American jurisprudence, "law" is a generic term comprising the aggregate of those rules and principles which the governing power in an organized jural society recognizes as those which it will enforce or sanction, and according to which it will regulate, limit or protect the conduct of its members. Black's Law Dictionary (3d ed. 1933) p. 1074. It encompasses the common law, equity law, admiralty law, and customary law as well as the statutory law. Surely if the phrase "the laws of the several states" as used in the first Judiciary Act is broad enough to include common law decisions (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64), there is no textual necessity for a narrower reading of the phrase "national laws or regulations" in the Convention. In the absence of a modifying adjective, therefore, it would appear that the word "laws" may properly be equated with the French word "législation." Since the English and French texts "* * * can, without violence, be made to agree, that construction which establishes this conformity ought to prevail." *United States* v. *Percheman,* 7 Pet. 51, 88; cf. *United States* v. *Arredondo,* 6 Pet. 691, 737-738; 29 Am. J. Int'l L. Supp. No. 4, pp. 971-973.

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that the use of the broader word "législation" in Article 2 was intentional and meaningful. Although the English text of Articles 2 and 12 does not clearly convey this distinction, it is consistent with it. See also Article 4, paragraph 3 (b), Article 5, paragraph 3 (b).

That the expression "national laws or regulations" is as broad and sweeping as the French text reveals it to be is further shown by the interpretation given it by the International Labor Office. On this score, the "Grey Report" is revealing. The purpose of that Report, as we have already noted, *supra*, pp. 23, 26–27, was to analyze the existing legal provisions relating to the obligations of shipowners toward sick or injured seamen so that it might be ascertained which aspects of the problem seemed capable of being the subject of a Convention. A reading of the Report discloses that the terms "national laws," "law," "maritime law," and "legislation" are used throughout interchangeably. Thus, referring to particular provisions of the "national laws," the Report discusses certain provisions of the general martime law and the statutory law of the United States, designating these provisions as being the "law" or "laws" of the United States without particularizing their origin. See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen In Case of Sickness, Including The Treatment of Seamen Injured on Board Ship, First Discussion*, pp. 53, 59, 63, 66, 67, 70, 72, 80, 82, 83, 84, and *passim*.

In view of the broadness of the expression "national laws or regulations" and the latitude thus afforded member nations in applying the provisions of the Convention, we submit that no valid distinctions can be drawn between existing statutory law and decisional law nor between those provisions, such as paragraph 1 of Article 2, which the contracting parties are obligated to apply and others, such as paragraph 2 of Article 2, which the contracting parties may make applicable at their election. Any such distinctions are refuted by the memorandum of the International Labor Office (*supra*, pp. 41–43): "[The expression has] * * * unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion * * * from an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law."

2. *The Historical Background of the Convention Reveals No Intention to Repeal Existing Legal Principles Which Absolve the Shipowner of Liability Where the Seaman Is at Fault.*—Implicit in petitioner's argument that the exceptions permitted by paragraph 2 can be made effective only by enacting legislation after ratification of the Convention is the contention that the purpose of the Convention is to grant the seaman the maximum possible benefits by doing away with the notion of fault as a bar to recovery. We submit

that that contention finds no basis in the history of the Convention.

Examination of the pertinent reports and records of the Convention discloses quite plainly that its general purpose is to achieve a certain measure of standardization internationally through an average formulation of existing national law. Awareness of this limited objective is implicit in the proceedings of the 1929 and 1936 conferences. See International Labor Conference, *Proceedings, Thirteenth Session* (1929), pp. 130–142, 348–376, *passim;*[53] International Labor Conference, *Proceedings, Twenty-first Session* (1936), pp. 72–84, 247–258, *passim.* And the reports made by the International Labor Office state specifically that the Draft Convention, which it prepared, is a compromise solution. See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, First Discussion, passim;* International Labor Conference (Geneva 1931), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II), *passim*. Thus, the 1929 Report ("Grey Report") concludes, after analyzing existing law, that (p. 202) "The difficulties are considerable, but by no means insuperable. For on the whole the laws are fairly concordant, and it has been found possible to indicate for the most important problems solutions, in the nature of compromises, which might be embodied in a Draft Convention or Recommendation." Similarly, the 1931 Report, which incorporates the text of the Draft Convention prepared by the Office after examination of the replies received to the questionnaire circulated by the Office, observes that (p. 159) "* * * the preceding Chapter gave a comparative analysis of the replies of the Governments, from which the Office has endeavoured to show that on most of the essential points agreement was possible, and to deduce the average solutions suitable for treatment in a Draft Convention."

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[53] For example, at the outset of the general discussion, the Chairman of the Committee stated: (*id.* at 131):

"The question before the Committee was whether the development of the shipowner's liability and of social insurance should be left to the free play of forces within national legislation or whether they should be subjected to some form of international regulation. The Employers' Group was in favour of leaving them to the free play of forces within national legislation, but the majority of the Committee favoured an international system of regulation. At the same time, it was recognised that any such international system must not aim at the maximum possible benefits for the seaman; it must aim at achieving a reasonable average which can be applied in any country. In some cases there may be a possible divergence of opinion—there were in fact divergences in the Committee—as to the scope and the amount of these benefits and of the protection to be granted to the seaman."

Specifically, it is manifest from these reports and records that an exception based on the notion of fault represents an average solution in its formulation. See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, First Discussion*, pp. 41–45, 210–211; International Labor Conference (Geneva 1931), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II), pp. 29–43, 125–129; 161–162; International Labor Conference, *Proceedings, Thirteenth Session* (1929), pp. 137–139; 350, 363, 373; International Labor Conference, *Proceedings, Twenty-first Session* (1936), p. 250 (see *infra*, pp. 71–77).

Moreover, the replies of the Governments to the questionnaire circulated by the International Labor Office show plainly that the notion of fault was deliberately introduced into the proposed Convention because of the then existing state of national law of the member Governments. See Report II, *op. cit, supra* at pp. 29–43, 161–162. Although many of the replies were rather elaborate, it is significant that, in none of them, is there any request or suggestion that an exception based on the notion of fault would have to be the subject of affirmative statuary enactment by the contracting Governments before it would become operative in nations where such an exception was already recognized or enforced by existing legal principles.

This history, we submit, refutes the contention that the Convention is intended, in this regard, to adopt a standard of liability higher than that which prevailed under the maritime law of the member Governments. To the contrary, it discloses the adoption of a standard which is an average formulation of existing law.

3. *The Decision Below Is in Accord with the Construction Given Article 2 by the Executive Departments.*—In support of his position, petitioner relies primarily on a statement made in 1939 by Secretary of State Hull with reference to H. R. 6881, and upon the President's proclamation of October 29, 1939 (*supra*, pp. 33, 35). These statements, if interpreted as petitioner would read them, are inconsistent with previous and subsequent executive expressions and actions, and, as we have already indicated, are not only unsupported by, but indeed inconsistent with, the history and purposes of the I. L. O. Conventions in general and this Convention in particular.

The reports submitted to the Senate in 1937 by the executive departments recommending ratification of the Convention rebut any inference that this Government intended ratification to have the effect of repealing existing general maritime law. These reports informed the Senate that existing standards in this country were as high or higher than those provided in the Convention (with one exception not here relevant) and recommended ratification on the ground that the

Convention would raise international standards to the level of American law and thus equalize operating costs. See Sen. Exec. Rep. 8, 75th Cong., 3d Sess., pp. 3, 6, 7, 10, 12, 13, 14, 16–19. Thus, summarizing the observations of the interested departments, Secretary of State Hull stated (*id.* at p. 3):

> Existing standards of safety and labor conditions upon American vessels, whether imposed by statute or adopted in general practice, are in general and with certain exceptions set forth in detail in the accompanying reports from the governmental agencies most directly concerned, equal to or higher than those fixed by these conventions.
>
> Accordingly, ratification of these draft conventions will impose only a comparatively slight additional financial burden upon the operation of the American merchant marine. Ratification by other governments which compete with us in the international shipping trade and whose standards of employment on board ship are below those set forth in these draft conventions, will, however, considerably increase the operating costs of the merchant marines of these nations.
>
> The accompanying report of the American Government delegates refers to the desirability of "equalizing operating costs on merchant vessels in the competitive international trade", and adds that "it was the unanimous judgment of the American

> delegation that if promptly ratified by the requisite number of member States to make them effective, the conventions will go far to equalize operating costs as between American sea-going merchant vessels and the vessels of America's principal maritime competitors."
>
> The delegates point out that the American representatives endeavored persistently "to raise international standards, particularly of hours and manning, to the level of American law and practice."

The Senate Subcommittee similarly reported that "American law provides standards substantially equal to or higher than those in the draft convention." *Id.* at p. 2.[54] In presenting the Convention on the floor of the Senate, Senator Thomas, speaking for the Senate Committee on Foreign Relations, referred to the favorable reports of the various executive departments and assured the Senate that "if every safeguard which anyone could possibly ask for had not been taken in the way of reservations and in the way of protection," and "if there were the least bit of doubt about any of these conventions," he would not suggest ratification at this time. 83 Cong. Rec. 9029. On the basis of these assurances, the Convention was ratified without further discussion.

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[54] See *Jordine* v. *Walling* (C. A. 3), opinion as amended December 14, 1950:

"* * * But even if we assume that the treaty was self executing, which may be doubtful, it is apparent from an examination of the terms of Articles 2, 3 and 4 that the liability which it imposed upon shipowners in respect of seamen was no greater than that which the maritime law as enforced in the United States had previously imposed upon American shipowners. The convention in this respect was merely declaratory of the existing American law of maintenance and cure."

These expressions of opinion by the executive departments and the Senate are utterly inconsistent with the construction of Article 2 for which petitioner here contends. If the exceptions permitted by the Convention can be made effective only by the adoption of legislation, ratification would have repealed the pertinent maritime law. But, in that event, contrary to the assurances given the Senate by the executive departments and the Committee on Foreign Relations, ratification would greatly have increased the operating costs of American shipowners[55] and placed them at a disadvantage with respect to the operating costs of other maritime nations, pending the enactment of implementing legislation.

It is most improbable, therefore, that the executive departments intended to express the view two years later that ratification did have precisely that effect. It should be emphasized that inclusion in H. R. 6881 of provisions enacting into law the exceptions permitted by the Convention cannot be taken as an indication that the exceptions could not be availed of without statutory enactment. Those provisions may well have been included not only out of excess of caution, but out of a desire to codify the maritime law in the field covered by the Convention in so far as the terms of the Convention left room for national discretion.[56] The statements relied upon by petitioner, made in an effort to persuade the Congress of the desirability of enacting such legislation, may well have derived from the same motives. So read, these statements may be reconciled not only with the contemporaneous executive construction of the Convention in 1937 but with executive construction subsequent thereto.

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[55] Costs would be increased in at least two respects: (1) the shipowner would be absolutely liable for maintenance and cure irrespective of fault or concealment, or of whether the injury occurred in the service of the ship; and (2) liability would be extended by virtue of Article 1 to persons such as longshoremen and employees of independent contractors who are not entitled to maintenance and cure under the general maritime law.

By both action and failure to act, the executive departments have, since 1939, affirmed their belief that ratification of the Convention has not worked a repeal of the pertinent general maritime law. Thus, the annual reports filed by this Government with the International Labor Office pursuant to Article 22 of the Constitution of the I. L. O. state that the exceptions permitted by Article 2 of the Convention are in force by virtue of existing maritime law.[57] In this connection, it is not without significance that the several maritime unions have, by their silence, apparently acquiesced in this executive construction of the Convention. Although copies of these reports are sent annually to the American Federation of Labor in accordance with Article 23 of the I. L. O. Constitution, no observation thereon of any nature has ever been received.[58] Finally, although the Government was the principal shipowner during the war years and is still a major shipowner, the executive branch has taken no steps since 1939 to effect the enactment of an implementing statute which would affirmatively except it from liability as a shipowner under Article 2 of the Convention. Such non-action is consistent only with the view that an implementing statute is not required.[59]

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[56] Cf. H. R. Rept. 1328 (*supra*, p. 31) recommending enactment of H. R. 6881 "to the end that the extent of the obligations may be certain and fixed" (p. 4). See also Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, on H. R. 6726 and 6881, 76th Cong. 1st Sess., pp. 9, 33; Hearings before the Subcommittee on the Committee on Commerce, United States Senate, on H. R. 6881, 76th Cong. 3d Sess., pp. 91–92, 303.

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[57] See, *e. g.*, the report for the period July 1, 1949, to June 30, 1950, which is reprinted in the Appendix, pp. 125–127.

[58] See report for the period July 1, 1949, to June 30, 1950, Appendix, p. 137.

[59] It should be noted that the provisions in question evoked little or no opposition in Congress, the bill failing of passage because the Senate Committee added to it other highly controversial provisions. See p. 30, *supra*. Hence petitioner's suggestion (Br. p. 32) that the omission of Congress to enact into statute the exceptions permitted by the convention represented a deliberate "national policy not to make exceptions" is entirely without support.

Petitioner's further argument from the enactment of legislation in connection with the Officers Competency Certificate Convention (Br. pp. 31–32) is equally without merit. The exception embodied in that legislation was not reflected in any existing rule of maritime law and hence could be availed of only through enactment of a specific statute.

We submit, therefore, that, contrary to petitioner's assertions, the decision below is in accord with the construction given the Convention by the executive departments. But even if the 1939 statements are to be construed as petitioner construes them, the most that can be said is that the executive construction of paragraph 2 of Article 2 has been inconsistent. In such circumstances this Court would be wholly justified in adopting that construction which best harmonizes with the text and purposes of the Convention and with the understanding of it expressed by the I. L. O. itself.

II

THE COURT BELOW PROPERLY DENIED RECOVERY OF MAINTENANCE AND CURE BECAUSE OF PETITIONER'S MISCONDUCT

Petitioner further challenges the decision below on the grounds that the standard applied by the court finds no warrant either in the Convention or in the general maritime law and that, in any event, his misconduct falls short of that standard. We submit that there is no merit to either contention.

A. CONDUCT BY A SEAMAN IN RECKLESS DISREGARD OF HIS OWN SAFETY IS A BAR TO RECOVERY FOR MAINTENANCE AND CURE UNDER THE CONVENTION AND GENERAL MARITIME LAW

Although both courts below employed the term "Gross negligence" in describing the standard of conduct which defeats the seaman's traditional right to maintenance and cure, analysis of the opinions reveals that those words were intended to signify not merely a degree of negligence but conduct which is in reckless disregard of safety.[60] Thus, Judge Medina observed that (R. 108):

> Attempts to classify the various graduations of negligence have largely proved elusive. Generalities are likely to lead to error in particular situations. If maintenance is to be denied here, the element of wilfulness or something akin to it must be found in one form or another. This being true it is hard to find any definition of "gross" negligence which will fit into the pat-

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[60] See American Law Institute, *Restatement, Torts* (1934) § 500, *Comment g*, which explains the distinction as follows:

"*g. Negligence and recklessness contrasted.* Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency in that reckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."

> tern of the maintenance cases other than that of a reckless disregard of safety. Restatement, Torts §§ 500, 502 (1934). * * *

The court below did not reject this test, but differed with Judge Medina solely on the question whether, on the undisputed evidence, such gross negligence had been shown. Examining petitioner's conduct, as disclosed by his own testimony, it found that he had acted in reckless disregard of his own safety (R. 141): "We think that a man who acts as he did under circumstances of danger does not show even a minimal degree of regard of the consequences of his act. * * *"[61] Any doubts as to the standard applied by the court below are dispelled, we believe, by the court's opinion on petition for rehearing. Petitioner, apparently reading the first opinion of the court below as employing the words "gross negligence" to mean merely a variant of negligence, urged at great length on petition for rehearing that the element of wilfulness or wantonness must be present if recovery is to be defeated either under the general maritime law or Article 2 of the Convention (R. 143–

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[61] "* * * an actor's conduct is in reckless disregard of his own safety if he does an act or fails to do an act knowing or having reason to know of facts which would lead him, as a reasonable man, to realize that such conduct not only creates an unreasonable risk of bodily harm to himself but that such risk involves a high degree of probability that substantial bodily harm will result to himself." See American Law Institute, *Restatement, Torts* (1934) § 502, *Comment.*

149, 152). In reply, the court stated that (R. 157): "These words [wilful act, default or misbehavior] are used to describe conduct which will preclude recovery of maintenance, and that is precisely the meaning of 'gross negligence' as stated in our original opinion. * * *"

The standard thus applied is, we believe, entirely in accord with this Court's pronouncements in the *Aguilar* case. In *Aguilar,* the Court fully reviewed the seaman's traditional right to maintenance and cure and recognized that it covers all injuries and ailments incurred without "* * * disqualifying misconduct * * *." 318 U. S. 724, 734. Various phrases were employed to indicate the type of misconduct which was disqualifying. The Court stated that only "* * * culpable misconduct * * * some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. * * * the seaman's fault, unless gross, cannot defeat it * * *" (pp. 731, 734). Plainly, to act in reckless disregard of one's own safety is to commit a "deliberate act of indiscretion" or "gross fault."

Examination of the cases cited by this Court in *Aguilar* (p. 731) lends additional support to the standard used below. Thus, in *Peterson* v. *The Chandos,* 4 Fed 645 (D. Ore.), the court declared that "* * * the fault which will forfeit this right upon the part of the seaman must be some positively vicious conduct, such as gross negligence or wilful disobedience of orders. * * *" (*Id.* at 651). And in *The J. F. Card,* 43 Fed. 92 (E. D. Mich.), it was observed that "* * * it is too well settled to require a citation of authorities that a seaman taken sick or receiving injuries in the service of the ship is entitled to be treated at the expense of the ship, unless such injuries are received in consequence of his own gross carelessness. * * *" (*Id.* at 93.) Similarly, the court stated in *The Ben Flint,* 3 Fed. Cas. No. 1299 (D. Wis.), that "* * * to forfeit a claim for care or attendance under the rule, the disability or sickness of the seamen must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders, and persistent neglect of duty. * * *" (p. 185.)[62] See, also, *Ellis* v. *American Hawaiian S. S. Co.,* 165 F. 2d 999, 1001 (C. A. 9); *Lage* v. *United States,* 90 F. Supp. 583, 585 (S. D. N. Y.); *Olsen* v. *Whitney,* 109 Fed. 80 (N. D. Calif.); *Reed* v. *Canfield,* 20 Fed. Cas. No. 11,641 (C. C. D. Mass.). There can be little question that a reckless disregard for one's own safety falls within the types of conduct these opinions describe.

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[62] The peculiar character of labor requirements aboard ship, especially as they existed in 1860–90, readily explains the reference in these decisions to wilful misconduct and gross negligence as being "vicious" or as "operating as a fraud upon the owners." A ship embarks only the number of men indispensable to form a crew, and the replacement

We further submit that the standard applied below is synonymous with the words "wilful act, default or misbehavior" in paragraph 2 of Article 2 of the Convention. On their face, these words comprehend a "deliberate act of indiscretion" signified by a reckless disregard of safety; and examination of the pertinent reports and records of the Convention bears out this construction.

As we have already noted above, pp. 58–59, the choice of those words in the Convention represents an average formulation of the maritime law of the several member Governments. Thus, the "Grey Report" observes that numerous expressions are employed in the national laws to define the notion of fault— "* * * negligence, wilful act or omission, serious fault, serious delinquency, dereliction of duty, misbehavior, reprehensible or punishable action, sickness or injury wilfully incurred"—and concludes that "The Conference will have to decide whether it intends to introduce the notion of fault into the international regulations, and, if so, it will have to state whether the rights of seamen and the obligations of ship-

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of seamen who become incapacitated for work during the voyage can take place only at the various ports of call, where, indeed, the recruitment of competent replacements may meet with considerable difficulty. The reduction in the number of hands available, especially if the voyage is prolonged, may entail serious difficulties in the working of the ship and threaten her safety. In any case, it results in an excess of labor and fatigue for the rest of the crew.

owners will be restricted in case of fault, or in case of serious fault, or only in case of wilful misconduct * * *." See International Labor Conference, Thirteenth Session (Geneva 1929), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, First Discussion*, pp. 42, 211. Accordingly, in preparing its draft conclusions of the points upon which the Conference should ask the International Labor Office to consult the Governments, the Office suggested consultation on a "Possible exception in case of sickness, injury or death due to the fault of the seaman, to his serious fault, or only to his wilful fault." See International Conference, *Proceedings, Thirteenth Session* (1929), pp. 348, 350.

The 1929 Conference, although agreeing that the Governments should be consulted on the question of introducing the notion of fault into international regulations, disagreed as to the formula chosen by the Office. It was of the opinion that it would be preferable to deal with injury and sickness separately. As regards injury, the possibility of an exception was maintained only in the case of "injury intentionally caused by the seaman." (*id.* at p. 363); as regards sickness the following proposals were suggested in the course of discussion (*ibid.*, see also p. 138):

> (1) Possible exception in case of sickness due to the seaman's own act.

> (2) Possible exception in case of sickness due to the wilful misconduct of the seaman or to his own act.
>
> (3) Possible exception in case of sickness intentionally caused by the seaman.

The definitive text finally adopted by the Conference stated as follows (*id.* at p. 373):

> (a) possible exception in case of injury intentionally caused by the seaman;
>
> (b) possible exception in case of sickness due to the wilful misconduct of the seaman or to his own act.

In accordance with this formulation, questionnaires were then circulated by the Office among the Governments asking:

> 9. Do you consider it necessary to provide for exceptions:
>
> (a) in case of injury wilfully caused by the seaman;
>
> (b) in case of sickness due to the wilful misconduct of the seaman, or to his own act?

See International Labor Conference (Geneva, 1931), *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship, Second Discussion* (Report II), p. 29.

In their replies to this question, many of the Governments rejected the narrow exception suggested by the 1929 Conference (*id.*, at pp. 30–43, 125–129). Thus, it was variously proposed that an exception be made for injury or sickness

"* * * imputable to the seaman's own wilful fault, or due to gross negligence on the part of the seaman, or concealed at the time of the engagement * * * wilfully caused by the seaman or due to grave negligence on his part * * * due to the wilful act or inexcusable misconduct of the seaman * * * wilfully caused by the seaman or due to gross negligence of the seaman * * * wilfully caused by the seaman or due to his serious misconduct * * * due to the seaman's own wilful act or default * * * due to the fault of the seaman or concealed by him at the time of engagement * * * due to the seaman's own fault or contracted when he is on shore leave without authorization * * * wilfully caused by the seaman, or due to serious fault on his part, or concealed by him at the time of his engagement" (*id.* at pp. 125–128).

Analyzing these proposals, the Office observed that they (*id.*, at p. 128) "* * * appear to have one idea in common that has attracted the attention of nearly all Governments, and that is the idea of wilfulness. It is this factor of wilfulness that plays a decisive part in the definitions of inexcusable fault, serious fault, grave negligence, etc." and concluded that (*id.*, at p. 129), "It therefore considers that the wishes of most Governments will be met by proposing the introduction in the international regulations of an exception for injury or sickness due to the wilful misconduct of the seaman, and injury or sickness intentionally concealed at the time of the engagement." Accordingly, the Office prepared a proposed Draft Convention containing the following provision (*id.* at p. 170):

> Article 3 (2) Nevertheless, national laws or regulations may make exceptions in respect of:
>
> * * * * *
>
> (b), injury or sickness due to the wilful misconduct of the sick, injured or deceased person, and sickness or infirmity intentionally concealed when the engagement is entered into.

This formulation by the Office was rejected by the Conference in 1936 as lacking precision. The report of the Committee on the protection of seamen in case of sickness or accident states as follows:

> Three amendments to this text were proposed, two of which were intended to give greater precision to the notion of "misconduct", while the third was for the purpose of limiting the restrictions allowed by the Office text in case of death.
>
> The first of these amendments, proposed by the Employers' members, read as follows:
>
>> Substitute for the [illegible] "wilful misconduct" the word[illegible]ct, default or misbehavior."
>
> The second amendment, proposed by a Government member, was drafted thus:

> After the words "wilful misconduct" insert the words "or gross negligence."

These amendments were based on the view that the Office text did not seem to cover all the cases which might arise, and that the shipowner ought not to be held liable for the consequences of the act or even for the negligence of the seaman. A Government member observed that he would be prepared to support the first of these amendments if the word "wilful" were maintained, and the Employers' members then altered their amendment to read as follows:

> Substitute for the words "wilful misconduct" the words "wilful act, default or misbehavior."

On being put to the vote, the amendment as thus drafted was adopted by 23 votes to 16.

The second amendment, on the other hand, was rejected by 18 votes to 3.

The third amendment, which was submitted by a Government member, read as follows:

> After the words "deceased person" insert the words "sickness due to his own act."

This amendment was withdrawn.

See International Labor Conference, *Proceedings, Twenty-first Session* (1936), p. 250.[93]

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[93] The discussions taking place during committee meetings are not reported verbatim in the record of proceedings.

In consequence of the amendments accepted by the Committee, paragraph 2 of Article 3 of the Draft Convention proposed by the Office assumed the following form (*ibid.*):

> * * * injury or sickness due to the wilful act, default or misbehavior of the sick, injured or deceased person, and sickness or infirmity intentionally concealed when the engagement is entered into.

And in that form it was adopted by the Conference without debate (*id.* at p. 79) and sent to the Drafting Committee. The Drafting Committee then submitted a draft (in which Article 3 was renumbered Article 2 in the form in which it now appears in the Convention) which was adopted by the Conference at a final record vote (*id.* at pp. 171, 269, 328).

In our view, this history may fairly be read in support of our position that the words "wilful act, default or misbehavior" are sufficiently broad to encompass the reckless disregard of safety. Although the phrase "wilful misconduct or gross negligence" was rejected by the Committee at the 1936 Conference in favor of "wilful act, default or misbehavior," we do not think it a proper inference that the Conference thereby intended to remove from the definitions of disqualifying conduct that conduct which is in reckless disregard of safety. Rather, it is to be inferred that, in substituting the words "act, default or misbehavior" for "misconduct" in the term "wilful misconduct" proposed by the International Labor Office, the Conference intended to enlarge the classes of disqualifying conduct. As the Committee report notes (*id.* at p. 250): "These amendments were based on the view that the Office text did not seem to cover all the cases which might arise, and the shipowner ought not to be held liable for the consequences of the act or even for the negligence of the seaman. * * *" In this regard, it is not without significance that many of the Governments had already expressed the desire, by their replies to the questionnaire (*supra*, pp. 73–74), of providing for an exception broader than that previously proposed.

We submit, therefore, that the standard applied by the court below is in accord with the general maritime law and Article 2 of the Convention.

B. PETITIONER'S CONDUCT IN THE CIRCUMSTANCES OF THIS CASE WAS IN RECKLESS DISREGARD OF SAFETY

We believe that the record fully supports the unanimous judgment of the court below that petitioner did not "* * * show even a minimal degree of regard for the consequences of his act. * * *." (R. 141.)

According to petitioner's testimony, the facts are as follows: Petitioner, a messman aboard the *Anna Howard Shaw*, went ashore on leave while the vessel was in the Bay of Naples on October

30, 1944. Together with two other members of the crew, he spent some time sightseeing in the water-front town of Bagnoli, stopping at various stores and drinking a bottle of wine (R. 36, 37, 71). They then entered a dance hall where they consumed another glass of wine apiece (R. 36, 71, 82).[64] After about an hour and a half, most of which time was spent in dancing and talking with some Italian women (R. 65, 81), petitioner entered an adjoining room, overlooking the sea, which had French doors reaching to the level of the floor (R. 37, 66, 82). On the other side of these doors, which were open, petitioner observed a wholly unprotected ledge which extended out from the building some two or three feet (R. 38,

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[64] In this regard, the opinion of the district court states as follows (R. 107–108):

"The evidence as to libellant's intoxication is conflicting. He says he had had only about a third of a small bottle of wine and one glass more before he was injured. The record of the hospital to which he was taken after his injury, however, contains the entry 'acute alcoholism.' Libellant says he may have presented a stupefied appearance when he reached the hospital, because he had previously been given morphine; therefore the hospital doctors may have thought him drunk. The ship's log is interesting but inconclusive. It reads:

"'* * * Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter, and James M. Barr, messman, stated Warren was sober. Injury apparently accidental.' I am inclined to think libellant was less sober than he says he was, but I find he was not so under the influence of liquor as to be barred from recovery."

The court below accepted the finding that petitioner was not drunk (R. 140).

67, 68). There was no guardrail around the ledge, but there were masonry posts at each end which extended up to the roof of the building (R. 38, 87). Attached to one of these posts, by brackets fastened in the masonry, was a thin metal rod about a half-inch in circumference, comparable, according to petitioner, to a "lightning arrester" or a "lightning rod" (R. 38, 69). The ledge was approximately 30 to 35 feet above the ground (R. 39, 83). Petitioner went out on this ledge to a position where the toes of his shoes were about six inches from the edge (R. 83, 85), and remained there a few minutes observing the scenery.[65] He then leaned over, and, taking just a "casual glance" at the metal rod, grasped the rod (R. 38, 68, 70). As he took hold of the rod and leaned over the edge, the rod came loose, petitioner lost his balance and fell some 30 feet to the ground below, fracturing his right lower leg (R. 38, 39, 68, 83).

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[65] Petitioner's brief states that "he observed other people go over and onto the ledge and out to the edge and look, and so did he" (p. 4). The record discloses the following colloquy on Recross Examination (R. 88):

"Q. Do I understand you to say now that there were some people standing to the right or to the left of you as you were standing on the edge? Is that your testimony?—A. I don't know whether they were out to the ledge or whether they were casually drifting around the room.

"Q. You weren't paying any attention?—A. That is right. I do not know just where they were, that's all."

Petitioner's indiscretion is graphically portrayed by his own words. Thus, petitioner testified as follows (R. 38, 68):

> * * * There was no rail, protected railing. It was just a straight platform but there was an iron rod running up the side of the post, which would be comparable maybe to our lightning arrester or something of that type, and I walked out there and stood and watched a little bit with my hand on the post, and it was a masonry post, and I looked over a little bit and somehow or other I took hold of this rod which was going up along the side, probably a half-inch metal rod, and I took hold of it and kind of looked out a little bit to see, it let loose unexpectedly, which was quite a surprise, you know, and I did not have time to recover myself, * * *
>
> * * * * *
>
> * * * I stood * * * probably for about three or four minutes, or maybe five minutes, before I took ahold of this iron and looked over and it pulled loose so easily that it was such a quick surprise that I couldn't recover myself.

Asked whether he had made any inspection of the rod, or the brackets before he took hold of it (R. 69), petitioner replied (R. 70), "Why, just casually. As you would glance on it, if it would look all right, you wouldn't make any note of it hanging loose at a glance. Naturally, you wouldn't make a very close observation."

To summarize, petitioner, although fully aware of the fact that he had been drinking, went out upon an unprotected ledge, two to three feet wide, which had a sheer drop of 30 to 35 feet. He stood there, about six inches from the edge of the ledge, for about three to five minutes, and then, although certainly cognizant of the fact that a fall would cause serious bodily injury, leaned over the edge and "somehow or other * * * took hold of this rod," which was like a "lightning arrester," without giving it more than just a "casual glance."

Such misconduct on petitioner's part falls well within the established meaning of conduct in reckless disregard of safety. Petitioner knew or had "reason to know of facts which would lead him, as a reasonable man, to realize that such conduct not only creates an unreasonable risk of bodily harm to himself but that such risk involves a high degree of probability that substantial bodily harm will result to himself." See American Law Institute, *Restatement, Torts* (1934) § 502, *Comment*; *Delaware & H. R. Corp.* v. *Bonzik*, 105 F. 2d 341, 344 (C. A. 3); *Evens* v. *Texas Pac.-Missouri Pac. Terminal R. R.*, 134 F. 2d 275, 276 (C. A. 5). We submit, therefore, that the decision below is clearly correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Philip B. Perlman,
Solicitor General.
Newell A. Clapp,
Acting Assistant Attorney General.
Leavenworth Colby,
James L. Morrisson,
Special Assistants to the Attorney General.
Samuel D. Slade,
Benjamin Forman,
Attorneys.

December 1950.

APPENDIX

By the President of the United States of America

A PROCLAMATION

Whereas a draft convention (No. 55) with regard to the liability of the shipowner in case of sickness, injury, or death of seamen, was adopted on the twenty-fourth day of October nineteen hundred and thirty-six, by the General Conference of the International Labor Organization, at its twenty-first session held at Geneva October 6–24, 1936, a certified copy of which draft convention, communicated by the Secretary-General of the League of Nations, acting in conformity with the requirements in the nineteenth Article of the Constitution of the International Labor Organization, to the Government of the United States of America as a Member of the said Organization, is, in the French and English languages, word for word as follows [French text omitted in printing]:

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Twenty-first Session on 6 October 1936, and

Having decided upon the adoption of certain proposals with regard to the liability of the shipowner in case of sickness, injury or death of seamen, which is included in the second item on the Agenda of the Session, and

Having determined that these proposals shall take the form of a Draft International Convention, adopts, this twenty-fourth day of October of the year one thousand nine hundred and thirty-six, the following Draft Convention which may be cited as the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936:

ARTICLE 1

1. This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation.

2. Provided that any Member of the International Labour Organisation may in its national laws or regulations make such exceptions as it deems necessary in respect of—

(a) persons employed on board,

(i) vessels of public authorities when such vessels are not engaged in trade;

(ii) coastwise fishing boats;

(iii) boats of less than twenty-five tons gross tonnage;

(iv) wooden ships of primitive build such as dhows and junks;

(b) persons employed on board by an employer other than the shipowner;

(c) persons employed solely in ports in repairing, cleaning, loading or unloading vessels;

(d) members of the shipowner's family;

(e) pilots.

ARTICLE 2

1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

ARTICLE 3

For the purpose of this Convention, medical care and maintenance at the expense of the shipowner comprises:

(a) medical treatment and the supply of proper and sufficient medicines and therapeutical appliances; and

(b) board and lodging.

ARTICLE 4

1. The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to defray the expense of medical care and maintenance to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide—

(a) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to medical benefits under the insurance or compensation scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

Article 5

1. Where the sickness or injury results in incapacity for work the shipowner shall be liable—

(a) to pay full wages as long as the sick or injured person remains on board;

(b) if the sick or injured person has dependents, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to pay wages in whole or in part in respect of a person no longer on board to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(a) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to cash benefits under the insurance or compensation scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of cash benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

Article 6

1. The shipowner shall be liable to defray the expense of repatriating every sick or injured person who is landed during the voyage in consequence of sickness or injury.

2. The port to which the sick or injured person is to be returned shall be—

(a) the port at which he was engaged; or

(b) the port at which the voyage commenced; or

(c) a port in his own country or the country to which he belongs; or

(d) another port agreed upon by him and the master or shipowner, with the approval of the competent authority.

3. The expense of repatriation shall include all charges for the transportation, accommodation and food of the sick or injured person during the journey and his maintenance up to the time fixed for this departure.

4. If the sick or injured person is capable of work, the shipowner may discharge his liability to repatriate him by providing him with suitable employment on board a vessel proceeding to one of the destinations mentioned in paragraph 2 of this Article.

Article 7

1. The shipowner shall be liable to defray burial expenses in case of death occurring on board, or

in case of death occurring on shore if at the time of his death the deceased person was entitled to medical care and maintenance at the shipowner's expense.

2. National laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefit is payable in respect of the deceased person under laws or regulations relating to social insurance or workmen's compensation.

ARTICLE 8

National laws or regulations shall require the shipowner or his representative to take measures for safeguarding property left on board by sick, injured or deceased persons to whom this Convention applies.

ARTICLE 9

National laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes concerning the liability of the shipowner under this Convention.

ARTICLE 10

The shipowner may be exempted from liability under Articles 4, 6 and 7 of this Convention in so far as such liability is assumed by the public authorities.

ARTICLE 11

This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race.

ARTICLE 12

Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.

ARTICLE 13

1. In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation, each Member of the Organisation which ratifies this Convention shall append to its ratification a declaration stating:

(a) the territories in respect of which it undertakes to apply the provisions of the Convention without modification;

(b) the territories in respect of which it undertakes to apply the provisions of the Convention subject to modifications, together with details of the said modifications;

(c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

(d) the territories in respect of which it reserves its decision.

2. The undertakings referred to in sub-paragraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of sub-

paragraphs (b), (c) or (d) of paragraph 1 of this Article.

ARTICLE 14

The formal ratifications of this Convention shall be communicated to the Secretary-General of the League of Nations for registration.

ARTICLE 15

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Secretary-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Secretary-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

ARTICLE 16

As soon as the ratifications of two Members of the International Labour Organisation have been registered, the Secretary-General of the League of Nations shall so notify all the Members of the International Labour Organisation. He shall likewise notify them of the registration of ratifications which may be communicated subsequently by other Members of the Organisation.

ARTICLE 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first

comes into force, by an act communicated to the Secretary-General of the League of Nations for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

ARTICLE 18

At the expiration of each period of ten years after the coming into force of this Convention, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall consider the desirability of placing on the Agenda of the Conference the question of its revision in whole or in part.

ARTICLE 19

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

ARTICLE 20

The French and English texts of this Convention shall both be authentic.

AND WHEREAS it is provided in Article 14 of the said draft convention that the formal ratifications thereof shall be communicated to the Secretary-General of the League of Nations for registration and in Article 15 that the convention shall come into force twelve months after the date on which the ratifications of two Members of the International Labor Organization have been registered with the Secretary-General of the League of Nations and that thereafter the convention shall come into force for any Member twelve months after the date on which its ratification has been registered:

AND WHEREAS the said draft convention was duly ratified on the part of the United States of America subject to understandings as follows:

> "That the United States Government understands and construes the words 'vessels registered in a territory' appearing in this convention to include all vessels of the United States as defined under the laws of the United States.

> "That the United States Government understands and construes the words 'maritime navigation' appearing in this Convention to mean navigation on the high seas only.
>
> "That the provisions of this convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this Government reserves its decision."

AND WHEREAS the ratification of the said draft convention by Belgium was registered with the Secretary-General of the League of Nations on April 11, 1938, subject to subsequent decisions regarding application to the Belgian Congo and the territories under Belgian Mandate and the ratification thereof by the United States of America, subject to the understandings above recited, was registered with the Secretary-General on October 29, 1938;

AND WHEREAS by such registrations the said draft convention became a formal convention between the United States of America and Belgium on October 29, 1938, which, pursuant to Article 15 thereof, will come into force as between the United States of America and Belgium on October 29, 1939, twelve months after the date on which the ratification of the United States of America was registered with the Secretary-General of the League of Nations, and pursuant to the same Article, will come into force, for other Members of the International Labor Organization whose ratifications may have been or hereafter may be registered with the Secretary-General of the League of Nations subsequent to October 29, 1938, twelve months after the date on which the ratification has been or may be registered in each case;

Now, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled in good faith by the United States of America and the citizens thereof, on and from October 29, 1939, subject to the understandings above recited and to any exceptions and any limitations of liability in accordance with the provisions of the convention which may be made by legislation or regulations on the part of the United States of America.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-ninth day of September in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States of America the one hundred and sixty-fourth.

[SEAL] FRANKLIN D ROOSEVELT

By the President:

CORDELL HULL

Secretary of State.

OCTOBER 27, 1950.

Mr. THACHER WINSLOW,
Director, Washington Branch,
International Labor Office,
1825 Jefferson Place NW.,
Washington, D. C.

Re: Walter K. Warren v. United States, No. 87,
Supreme Court, October Term, 1950

DEAR MR. WINSLOW: The above-entitled case, in which certiorari has recently been granted by the United States Supreme Court, involves a question of interpretation of the Shipowners' Liability Convention of 1936 (Convention No. 55). In pertinent part the Convention provides:

> ARTICLE 2. 1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury.
>
> 2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;
>
> (b) injury or sickness due to the willful act, default, or misbehavior of the sick, injured, or deceased person;
>
> (c) sickness or infirmity intentionally concealed when the engagement is entered into. * * *

We would appreciate being advised whether the International Labor Office considers these clauses to be self-executing or whether implementing legislation is required to give them effect. In particular, we are interested in ascertaining whether the International Labor Office construes the language "national laws or regulations" as having reference solely to statutes or whether that language includes, as well, the principles of general maritime law enunciated and enforced by the courts. In this connection, your attention is called to the authentic French text which employs the term "legislation nationale."

Since briefs in the above-entitled case must be filed with the Supreme Court by November 20, we would be most grateful if this information could be furnished as soon as possible.

Sincerely yours,

PHILIP B. PERLMAN,
Solicitor General.

INTERNATIONAL LABOUR OFFICE, GENEVA

13 Nov. 1950.

DEAR MR. SOLICITOR GENERAL: Mr. Winslow has communicated to me your letter of 27 October enquiring whether the International Labour Office considers certain clauses of the Shipowners' Liability Convention, 1936, to be self-executory.

I have pleasure in enclosing a memorandum stating our view on the subject, and will be happy to remain available if you should wish for any further information on the subject.

Sincerely,

(s) David A. Morse,
DAVID A. MORSE,
Director-General.

The SOLICITOR GENERAL,
Washington, D. C.

1. The International Labour Office has been asked by the Solicitor-General of the United States to advise whether it considers paragraphs 1 and 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, to be self-executing or whether implementing legislation is required to give them effect, and in particular whether it construes the language, "national laws or regulations" as having reference solely to statutes or whether that language includes, as well, the principles of general maritime law enunciated and enforced by the courts.

2. The International Labour Office has no special authority under the provisions of the Constitution of the International Labour Organisation to interpret the provisions of an International Labour Convention, authority to give an internationally binding interpretation being reserved to the International Court of Justice. The following observations may, however, be of assistance in evaluating the view which the International Labour Conference, to which, under the Constitution of the Organisation, reports concerning the application of Conventions by Members which have ratified them are furnished each year, would be likely to take of the questions raised by the present case.

3. The obligation undertaken by a Member of the International Labour Organisation when ratifying a Convention is defined by the Constitution of the Organisation in the following language: "* * * the Member * * * will take such action as may be necessary to make effective the provisions of the Convention." The nature of the action required in the particular country to

make effective the provisions of the Convention is left to be determined in the first instance by that country, subject to the procedure for International examination of annual reports made by ratifying Members provided for in the Constitution of the Organisation. As the extent to which the provisions of an international Convention are self-executory differs considerably under the constitutional law of different countries, no uniformity in the matter has been, or is likely to be, practicable. The International Labour Organisation has been concerned to satisfy itself that, in cases in which no legislation which clearly implements the provisions of a Convention has been enacted, the Convention is effectively self-executory under the constitution or general law of the country concerned and the forms of annual report addressed to Members of the International Labour Organisation for the purpose of securing information concerning the application of Conventions contain a question designed to elucidate this point.[1] Subject to their being satisfied on this point, the competent bodies of the International Labour Organisation have regarded the question of whether or not legislation is, in fact, necessary to make effective the provisions of such a Convention as being a matter for decision by each Member of the Organisation in the light of its constitutional practice and its existing law.

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[1] Question I of the Form for the Annual Report on the Convention concerning Shipowners' Liability (Sick and Injured Seamen), 1936, reads as follows: "Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, etc., to the International Labour Office with this report. Where, notwithstanding the obligations resulting from the act of ratification, national law is not already in complete harmony with the provisions of the Convention, please indicate (a) to what extent the ratification has modified previously existing law, and (b) what steps have been taken to ensure the observance of the provisions of the Convention."

4. From an international point of view, what is essential is that the provisions of a Convention should be fully applied; in regard to the manner of application, both the Constitution of the Organisation and the terms of the individual Conventions deliberately leave a wide measure of discretion to each country; it has frequently been pointed out that so many of the Conventions require detailed national regulations, administrative arrangements or provisions for inspection, penalties and other means of enforcement, that some legislation will, in most cases, be necessary to make the provisions of a Convention effective; but the criterion is solely whether or not the provisions of a Convention *can* be made fully effective on a self-executory basis.

5. No record has been found of any case in which it has been necessary for the International Labour Organisation to express an opinion on the question whether the term "national laws or regulations" which is frequently included in International Labour Conventions refers solely to statutes or can be regarded as also including the principles of general maritime law. The expression has, however, unquestionably been used for the purpose of leaving certain aspects of the questions dealt with in a Convention to national discretion and it would appear to be consistent with

this general purpose to interpret the provision as allowing each party to the Convention to make the exceptions provided for either by specific enactment or by the application of some existing legal principle or rule. The term "national laws or regulations", without explicitly stating this conception, would not appear to be inconsistent with it, and the French term *"legislation nationale"* is, if anything, of a more general and comprehensive character and includes not merely legislation in the narrowest technical sense, but other forms of legal prescription including decrees, ordinances of various types and, when applicable, principles of customary law. It is, of course, for the courts of each country to decide what effect the incorporation of the terms of the Convention in national law as the direct result of ratification, by specific statutory enactment, or otherwise, may have had, but from an international point of view it would appear legitimate for a Member of the Organisation to rely upon and have recourse to the exceptions provided for in paragraph 2 of Article 2 of the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936, irrespective of whether those exceptions have been specifically enacted or are applicable in virtue of existing customary law.

6. A fuller survey of the extent to which the questions raised by this case may have arisen in other countries in connection with this or other Conventions could be made, but its completion would take some time and it is doubtful whether there exist any cases sufficiently analagous to throw further light upon the matter.

INTERNATIONAL LABOUR OFFICE FORM FOR THE ANNUAL REPORT ON THE CONVENTION

CONCERNING THE LIABILITY OF THE SHIPOWNER IN CASE OF SICKNESS, INJURY OR DEATH OF SEAMEN, GENEVA, 1948

INTERNATIONAL LABOUR OFFICE

ARTICLE 22 OF THE CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION

Article 22 of the Constitution of the International Labour Organisation runs as follows:

> *Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.*

In accordance with the above provisions, the Governing Body of the International Labour Office examined and approved the following form of report. This has been drawn up in such a manner as to facilitate the supply of the required information on uniform lines and the preparation of the summary of reports to be submitted by the Director-General of the International Labour Office under Article 23 of the Constitution of the International Labour Organisation.

It is requested that Governments, in drafting reports, should not reproduce the full text of the questions contained in the form, but should prefix to each of their answers the numbers of the main questions in the form and the numbers of the Articles of the Convention.

Report for the period ______ to ______ in accordance with Article 22 of the Constitution of the International Labour Organisation, from the Government of ____________ on the measures taken to give effect to the provisions of the

CONVENTION CONCERNING THE LIABILITY OF THE SHIPOWNER IN CASE OF SICKNESS, INJURY OR DEATH OF SEAMEN

Ratification of which was registered on ________

I. Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, etc., to the International Labour Office with this report.

Where, notwithstanding the obligations resulting from the act of ratification, national law is not already in complete harmony with the provisions of the Convention, please indicate (a) to what extent the ratification has modified previously existing law, and (b) what steps have been taken to ensure the observance of the provisions of the Convention.

II. Please indicate in detail for each of the following Articles of the Convention the provisions of the above-mentioned legislation and administrative regulations, etc., or other measures, under which each Article is applied.

ARTICLE I

1. This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation.

2. Provided that any Member of the International Labour Organisation may in its national laws or regulations make such exceptions as it deems necessary in respect of:

(*a*) persons employed on board:

(i) vessels of public authorities when such vessels are not engaged in trade;

(ii) coastwise fishing boats;

(iii) boats of less than twenty-five tons gross tonnage;

(iv) wooden ships of primitive build such as dhows and junks;

(*b*) persons employed on board by an employer other than the shipowner;

(*c*) persons employed solely in ports in repairing, cleaning, loading or unloading vessels;

(*d*) members of the shipowner's family;

(*e*) pilots.

In addition, please indicate under what provisions the laws and regulations implementing the Convention are made applicable to foreign seamen.

If advantage has been taken of any of the exceptions provided for in paragraph 2 of this Article, please indicate which of the classes of persons mentioned in this paragraph have been excepted and indicate how these classes are defined.

ARTICLE 2

1. The shipowner shall be liable in respect of:

(*a*) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the examination of the engagement;

(*b*) death resulting from such sickness or injury.

2. Provided that national laws or regulations may make exceptions in respect of:

(*a*) injury incurred otherwise than in service of the ship;

(*b*) injury or sickness due to the wilful act, default or misbehaviour of the ~~sick,~~ injured or deceased person;

(*c*) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

In addition, if any of the exceptions allowed by paragraph 2, are provided for in the national legislation, please indicate which of the contingencies mentioned in this paragraph have been so excepted, and indicate how these contingencies are defined.

Please state whether the national legislation provides for the restriction of the shipowner's liability allowed by paragraph 3.

ARTICLE 3

For the purpose of this Convention, medical care and maintenance at the expense of the shipowner comprises:

(*a*) medical treatment and the supply of proper and sufficient medicines and therapeutical appliances; and

(*b*) board and lodging.

Please indicate the scope of the care provided for in the national legislation, stating whether all necessary medical, surgical and hospital care is included, and, if not, what forms of care are excluded. Please indicate also whether prosthetic appliances are furnished. Please indicate whether the shipowner's liability is limited to a prescribed maximum total or rate of expenditure for care, and, if so, what is the prescribed maximum.

Please indicate what, if any, standards of board and lodging are prescribed in the national legislation, and what, if any, limitation of the total or rate of expenditure for board and lodging is provided for.

ARTICLE 4

1. The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to defray the expense of medical care and maintenance to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(*a*) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to medical benefits under the insurance or compensation scheme;

(*b*) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

Please indicate what, if any, provision is made in the national legislation for ascertaining when the sick or injured person has been cured and when the sickness or incapacity has become permanent. In this connection please indicate what, if any, provision is made for obtaining impartial medical opinion.

If any limitation of the period during which the shipowner is liable for medical care and maintenance, as allowed by paragraph 2, is provided for in the national legislation, please indicate the limitation.

Please indicate whether there exists:

(i) a scheme of compulsory sickness insurance applying to seamen; and

(ii) a scheme of compulsory accident insurance or workmen's compensation applying to seamen; and, if so, please forward the texts of the laws and regulations governing such schemes.

If such schemes exist, please indicate whether provision is made in the national legislation for terminating the shipowner's liability as allowed by sub-paragraph (a) of paragraph 3, and how the time at which the sick or injured person becomes entitled to medical benefits under such schemes is defined.

Please indicate the principal classes of seamen excluded from the scope of such schemes, mentioning any exceptions which affect particularly foreign seamen or seamen not resident in the territory in which the vessel is registered.

ARTICLE 5

1. Where the sickness or injury results in incapacity for work the shipowner shall be liable:

(*a*) to pay full wages as long as the sick or injured person remains on board;

(*b*) if the sick or injured person has dependants, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to pay wages in whole or in part, in respect of a person no longer on board to a period which shall not be

less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(*a*) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to cash benefits under the insurance or compensation scheme;

(*b*) that the shipowner shall cease to be liable from the time prescribed by law for the grant of cash benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

Please indicate, with reference to subparagraph (b) of paragraph 1, whether the whole or a part of wages is payable to the dependants of the sick or injured person, and, if a part, what part.

Please supply the same information, mutatis mutandis, *with reference to paragraphs 2 and 3 of this Article as has been requested with reference to paragraphs 2 and 3 of Article 4.*

ARTICLE 6

1. The shipowner shall be liable to defray the expense of repatriating every sick or injured person who is landed during the voyage in consequence of sickness or injury.

2. The port to which the sick or injured person is to be returned shall be:

(*a*) the port at which he was engaged; or

(*b*) the port at which the voyage commenced; or

(*c*) a port in his own country or the country to which he belongs; or

(*d*) another port agreed upon by him and the master or shipowner, with the approval of the competent authority.

3. The expense of repatriation shall include all charges for the transportation, accommodation and food of the sick or injured person during the journey and his maintenance up to the time fixed for this departure.

4. If the sick or injured person is capable of work, the shipowner may discharge his liability to repatriate him by providing him with suitable employment on board a vessel proceeding to one of the destinations mentioned in paragraph 2 of this Article.

Please indicate, with reference to paragraphs 2 and 4, which of the four destinations (a), (b), (c), (d), *are provided for in the national legislation, and, where alternative destinations are so provided for, what, if any, provisions exist for determining the choice of the destination.*

ARTICLE 7

1. The shipowner shall be liable to defray burial expenses in case of death occurring on board, or in case of death occurring on shore if at the time of his death the deceased person was entitled to medical care and maintenance at the shipowner's expense.

2. National laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefit is payable in respect of the deceased person under laws or regulations relating to social insurance or workmen's compensation.

Please indicate, with reference to paragraph 1, what, if any, provisions in the national legislation govern the amount of the burial expenses for which the shipowner is liable.

Please indicate whether provision is made in the national legislation for the reimbursement of burial expenses under legislation relating to social insurance or workmen's compensation.

ARTICLE 8

National laws or regulations shall require the shipowner or his representatives to take measures for safeguarding property left on board by sick, injured or deceased persons to whom this Convention applies.

ARTICLE 9

National laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes concerning the liability of the shipowner under this Convention.

In particular, please indicate what, if any, provision is made for decisions having interim effect as regards disputes which occur abroad.

ARTICLE 10

The shipowner may be exempted from liability under Articles 4, 6 and 7 of this Convention insofar as such liability is assumed by the public authorities.

Please indicate to what extent, and in virtue of what provisions of the national legislation, the shipowner is exempted from liability, as allowed by this Article.

ARTICLE 11

This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race.

ARTICLE 12

Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.

III. Please state to what authority or authorities the application of the above-mentioned legislation and administrative regulations, etc., is entrusted and by what methods application is supervised and enforced.

IV. Please state whether decisions have been given by courts of law, or other courts, regarding the application of the Convention. If so, please supply the text of such decisions.

V. Please add a general appreciation of the manner in which the Convention is applied in your country, including such statistics as may be available relating to:

(1) the total number of seamen serving on ships which are subject to the provisions concerning shipowners' liability, etc.;

(2) the number of seamen who have been assisted in virtue of these provisions, distinguishing if possible between persons left ashore in the territory in which the ship is registered and those left ashore elsewhere;

(3) the total expenditure incurred by shipowners in respect of their liability, and where any part of this liability is assumed by a public authority, expenditure incurred by the latter.

Please state whether you have received from the organisations of employers or workers concerned any observations regarding the practical fulfillment of the conditions prescribed by the Convention or the application of the national law implementing the Convention. The information available for the Conference would be usefully supplemented by your communicating a summary of these observations, to which you might add any comments that you consider useful.

VI. Please indicate the representative organisations of employers and workers for which the reports on the application of the Conventions submitted to the Director-General in conformity with Article 22 of the Constitution have been communicated, in accordance with Article 23 of the Constitution of the International Labour Organisation.

Report for the period 1 July 1949 to 30 June 1950 in accordance with Article 22 of the Constitution of the International Labour Organisation from the Government of the United States on the measures taken to give effect to the provisions of the Convention Concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen ratification of which was registered on 29 October 1938

I

1. The following legislation and administrative regulations apply the provisions of the Convention. The leading court decisions are noted in the texts of the annual reports.

Public Health Service	42 U. S. C., Sec. 249.
Regulations	42 CFR, Sec. 32.1 to 32.23, inclusive
Recovery for injury to or death of seamen (Jones Act)	46 U. S. C., Sec. 688.
Longshoremen's and Harbor Workers' Act	33 U. S. C., Sec. 901.
Medicines	46 U. S. C., Sec. 666.
Subsistence to destitute seamen; return to the United States	46 U. S. C., Sec. 678.
Transportation of destitute seamen to the United States	46 U. S. C., Sec. 679.
Incapacitated seamen	46 U. S. C., Sec. 683.
Regulations of State Department	22 CFR, Sec. 118.6.
Deceased Seamen's Effects:	
Duty of Master where seaman dies during voyage	46 U. S. C., Sec. 621.
Proceedings in regard to effects	46 U. S. C., Sec. 622; 42 U. S. C, Sec. 248 (d).
Duties of consular officers	46 U. S. C., Sec. 624.
Regulations	22 CFR, Sec. 118.7.
Effects of seamen dying within the United States	46 U. S. C., Sec. 625.
Commissioner as arbiter	46 U. S. C., Sec. 651.
State Department Regulations for disputes overseas	22 CFR, Part 119.

Actions against United States	46 U. S. C., Secs. 741, 742; 50 U. S. C., App. Sec. 1291.
Unemployment Compensation for seamen	60 Stat. 978.
Workmen's Compensation benefits	5 U. S. C., Sec. 751.
Regulations	20 CFR, Part 1.
Vocational Rehabilitation	29 U. S. C., Sec. 31-41.
Regulations	43 CFR, Sec. 4353.

2. The question whether ratification of the Convention altered existing law, that is, whether the treaty is self-executing, has never been finally determined by the Supreme Court. In the case of *Aguilar* v. *Standard Oil Co.*, 1943, 318 U. S. 724, 738, Chief Justice Stone in a concurring opinion considered certain provisions of the Convention to be self-executing. The majority of the Court held that, on the issue presented, seamen were entitled to recovery under the general maritime law and that it was unnecessary, therefore, to consider the effect of the Convention. See also *Farrell* v. *U. S.* 1949, 336 U. S. 511, 69 Sup. Ct. 707, discussed under Article 3, paragraph 1 on "Shipowners Liability."

II

ARTICLE 1

The United States expressed the following understanding as a part of its ratification of the Convention:

> That the provisions of this Convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this government reserves its decision.

In addition, the following understandings were expressed and made part of its ratification:

> That the United States Government understands and construes the words "vessels registered in a territory" appearing in this Convention to include all the vessels of the United States as defined under the laws of the United States.
>
> That the United States Government understands and construes the words "maritime navigation" appearing in this Convention to mean navigation on the high seas only.

Under the terms of Article 1, the Convention "applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation," with such specified exceptions as may be made in national laws or regulations. Vessels are, in fact, registered in Alaska, Hawaii, Puerto Rico and the Virgin Islands under the laws of the United States and are provisionally registered in Guam under the laws of the United States. All vessels so registered or provisionally registered are "vessels of the United States as defined under the laws of the United States." Vessels are not registered in American Samoa either under the laws of the United States or under the regulations and orders for the Government of American Samoa. It follows, therefore, that a vessel documented in a territory or possession of the United States is in the same status as a vessel documented in the Continental United States.

The general maritime law, the Jones Act, and the Public Health Act apply to all vessels of the United States. Consequently, with only the minor exceptions hereinafter explained, all of the measures included in this report relate no less to persons employed on vessels registered in Alaska, Hawaii, Puerto Rico, the Virgin Islands and Guam than to persons employed on vessels registered in the Continental United States. No vessels are registered in American Samoa.

1. The law which implements the Convention (with the exceptions noted hereinafter) applies to the following workers:

General admiralty law

In respect of the rights of seamen to maintenance, cure and other benefits extended them in the general admiralty or maritime law, the Supreme Court has said, quoting from the opinion of the court below (The *Buena Ventura* 243 Fed. 797, 799):

> * * * everyone is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the voyage and welfare of the ship when she is on a voyage. *Norton* v. *Warner Co.*, 321 U. S. 565, 572, 63 Sup. Ct. 747, 1944.

The following workers have been held to be seamen for the purpose of general admiralty law: Masters,[1] wireless operators,[2] engineers,[3] pilots,[4] cooks and stewards,[5] and bartenders.[6]

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[1] *The E. H. Russell*, 1930, 42 F. 2d 568.

[2] *The Buena Ventura*, 1916, 243 Fed. 797.

[3] *The Bouker No. 2*, 1917, 241 Fed. 831.

[4] *Peterson* v. *United New York and Sandy Hook Pilots' Assn.*, 1934, 6 F. Supp. 649.

[5] *Pacific Mail S. S. Co.* v. *Schmidt*, 1914, 214 Fed. 513; *Marshall* v. *International Mercantile Marine Co.*, 1930, 39 F. 2d 551.

[6] *The J. S. Warden*, 1910, 175 Fed. 314.

7

The right to compensation for injury caused by the unseaworthiness of a ship extends to all workers "performing the ship's service with the owner's consent." *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 97, 66 Sup. Ct. 872, 878.

Compensation for injury

The right to compensation for injuries or death incurred in the service of the ship extends to the master and members of the crew of all vessels by virtue of the statutory extension of admiralty law commonly referred to as the Jones Act (46 U. S. C., Sec. 688). All other employees on board vessels in navigable waters, with minor exceptions, are covered by the workmen's compensation system established in the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., Sec. 901).

Government medical care

The Public Health Service Act extends government financed facilities for medical care without charge to seamen employed on vessels of the United States. "Seamen" is defined by statute to include—

> any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation. (42 U. S. C., Sec. 201 (h)).

"Vessel" is defined by statute to include—

> every description of water craft, or other artificial contrivance used, or capable of being used, as a means of transportation on water, exclusive of aircraft and amphib-

> ious contrivances. (42 U. S. C., Sec. 201 (i)).[7]

The implementing Regulations are found in Title 42, Part 32 of the Code of Federal Regulations.

Public Vessels

By statute, employees of vessels owned or operated by or for the United States or any corporation of the United States as a merchant vessel or tugboat may bring an action for a libel in personam in all cases where, if such vessel were privately owned or operated, the employees could bring proceeding in admiralty (46 U. S. C., Secs. 741, 742).

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[7] Medical care is available at facilities of the Public Health Service and, in appropriate cases, at public and private non-Service facilities at the expense of the Service to the following: (a) a seaman taken sick or injured on board or ashore while actually employed on a vessel (42 CFR 32.15); (b) a seaman employed for 60 days of continuous service on a registered, enrolled, or licensed vessel of the United States, a part of which service must have occurred during the 90 days immediately preceding application for care (42 CFR 32.14 (b)): (c) a seaman employed for 60 days of continuous service on a registered, enrolled, or licensed vessel of the United States even though more than 90 days have elapsed since his last service, provided he has not changed his occupation since his last service, and (i) his failure to engage in maritime service has been due to closure of navigation or economic conditions resulting in decreased shipping with consequent lack of opportunity to ship, or (ii) he has been receiving medical care and treatment since such last service at other than Public Health Service expense (42 CFR 32.17); (d) seamen taken from wrecked vessels of the United States and returned to the United States if sick or disabled at the time of their arrival (42 CFR 32.16).

In addition, it is provided by statute that:

> Officers and members of crews * * * employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service * * *; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom * * * and (3) collection of wages and bonuses, * * * have all the rights, benefits, exemptions, privileges, and liabilities under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. (50 U. S. C., App., Sec. 1291). See Iv, post.

Seamen who are employed by the Government of the United States (except those employed through the War Shipping Administration) are entitled to workmen's compensation benefits for injuries occurring while in the performance of duty. The benefits include medical, hospital, and other care or treatment required by the nature of the injury (5 U. S. C., Sec. 751).

In addition, federally financed vocational rehabilitation services are made available by the States to any merchant seaman who:

(a) while serving at any time after December 6, 1941, and prior to the termination of World War II, as declared by Presidential proclamation or concurrent resolution of the Congress,

(b) as an officer or member of the crew of a vessel owned or chartered by the Maritime Commission, or the War Shipping Administration, or operated under charter from such Commission or Administration,

(c) is disabled as a result of disease or injury or aggravation of pre-existing disease or injury incurred in line of duty during such period and not due to his own misconduct.

Vocational rehabilitation services include corrective surgery or therapeutic treatment necessary to correct or substantially modify a condition which is static and constitutes a substantial occupational handicap; prosthetic devices; occupation licenses, tools, and equipment; training; vocational guidance and counselling; and maintenance during the rehabilitation process. (29 U. S. C. 31–41; 13 F. R. 4353.) Alaska, Hawaii and Puerto Rico are "states" within the meaning of the statute involved, but the Virgin Islands, Guam, and American Samoa are not "states" within the meaning of the statute.

Foreign Seamen

As is indicated by the provisions already summarized above, neither citizenship nor nationality is a criterion for eligibility for protection in any of the applicable law. The general admiralty law, the Jones Act (46 U. S. C., Sec. 688), providing compensation for injury or death, and the Public Health Act (42 U. S. C., Sec. 249, and 42 CFR, Secs. 32.41, 32.101, and 32.106) providing for medical care, extend to all seamen employed on vessels registered under the laws of the United States.

In the Jones Act, establishing an action for the injury and death of seamen based on negligence, the court has held:

> When Congress used the word "seamen" in the Jones Act, it employed a word of general application, embracing men of any nation who sail the seas. *Kyriaskos* v. *Goulandris,* 1945, 151 F. 2d 132, 136.

In addition, under the Public Health Act, provision is made for medical care to seamen on vessels of foreign registry. (See 42 CFR, Secs. 32.41, 32.101, and 32.106.)

2. *Exceptions.*

(a) *Public Vessels.*

See above

(b) *Employees of third parties.*

Employees of an independent contractor do not have the rights of maintenance, wages, cure or repatriation against the shipowners[8] nor any claim for damages for injuries under the Jones Act against the shipowner.[9]

Qualified workers, however, regardless of the employment relation to the shipowner have a right to compensation for injury caused by the unseaworthiness of the vessel.[10]

(c) *Longshoremen and other workers in port.*

The shipowner is liable for compensation for injury to longshoremen caused by the unseaworthiness of the ship[11] and this rule is apparently applicable to any employee on board performing maritime work.

Formerly, longshoremen and other workers were entitled to benefits of seamen in respect to the shipowner's liability for injury or death caused by the shipowner's negligence.[12] With the passage of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., Sec. 901 ff) workers on vessels in navigable waters, other than masters or members of the crew are removed from the laws applying to seamen and are subject to a workmen's compensation system similar to shore-side workmen's compensation systems.

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[8] *Calvirno* v. *Farley*, 1938, 23 F. Supp. 654.

[9] *Calvirno* v. *Farley*, 1938, 23 F. Supp. 654.

[10] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85, 97; 66 Sup. Ct. 872.

[11] *Seas Shipping Co.* v. *Sieracki, supra.*

Longshoremen and similar harbor workers are not seamen for the purposes of maintenance and cure.[13]

ARTICLE 2

1. (a) *Sickness and injury.*

By general admiralty and maritime law a vessel and her owners are liable in case of sickness or injury of a seaman in the service of the ship for maintenance and care and for wages. *The Osceola,* (1902), 189 U. S. 158, 175; *Farrell* v. *U. S.*, 1949, 336 U. S. 511. For the duration of this liability see pages 517–519, *supra.*

The liability for maintenance and cure, which really means maintenance and care, is not limited to cases where the sickness or injury was caused by the seaman's employment or circumstances incidental to his work. *Loverick* v. *Warner & Co.*, 1941, 118 F. 2d 690, cert. den., 313 U. S. 577, 61 Sup. Ct. 1104; *Calmar S. S. Corp.* v. *Taylor,*

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[12] *International Stevedore Co.* v. *Haverty*, 1926, 272 U. S. 50; 47 Sup. Ct. 19.

[13] *Seas Shipping Co.* v. *Sieracki*, 149 F. 2d 98; *C. Flanagan & Sons, Inc.* v. *Carken*, 1928 (Texas Civil Appeals), 11 S. W. 2d 392.

1938, 303 U. S. 525. It is enough that they became manifest during his employment. Also by general admiralty and maritime law a seaman has a right to indemnity for injuries caused by the unseaworthiness of the vessel or of its appurtenant appliances, and this right is not affected by the negligence of a fellow servant or the due diligence of the owner of the vessel. *Mahnich* v. *Southern S. S. Co.*, 1944, 321 U. S. 96, 100; 64 Sup. Ct. 455. In addition, under the Jones Act, a seaman has a right to recover damages for injuries arising from the negligence of the employer. *DeZon* v. *American President Lines*, 1943, 318 U. S. 660, 63 Sup. Ct. 814, rehearing den. 319 U. S. 780, 63 Sup. Ct. 1025. Under the Jones Act, the seaman's right to recover is not barred because of the negligence of fellow servants or his own contributory negligence,[14] but contributory negligence may reduce the amount of damages awarded.

1. (b) *Death.*

Under the Jones Act, the shipowner is liable for compensation for death caused by his negligence (46 U. S. C., Sec. 688), but neither general maritime law nor the Jones Act makes the shipowner liable irrespective of fault.[15]

2. *Exceptions.*

The following exceptions permitted in the Convention are found in the implementing legislation:

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[14] *Socony-Vacuum Oil Co. v. Smith*, 1939, 305 U. S. 424, 59 Sup. Ct. 262.

[15] *Roberts v. United Fisheries Vessels Co.*, 1944, 141 F. 2d 288; cert. den. 323 U. S. 753, 65 Sup. Ct. 8; *Budgen v. Trawler Cambridge*, 1946, 65 N. E. 2d 533, 319 Mass. 315.

(a) *Injuries otherwise than in the service of the ship.*

The liability of a shipowner under the Jones Act is confined to injuries and to death resulting from injuries which occurred "in the course of employment." This phrase has been construed to permit recovery by a cook for injuries incurred on the dock while returning from shore leave,[16] and in the leading case *Aguilar* v. *Standard Oil Co.*,[17] recovery was permitted for injury which occurred on the property of the third party, which the seaman had to traverse in leaving the dock. The Supreme Court indicated that the liability of shipowner covers "all injuries and ailments incurred without misconduct on the seaman's part," "at least while he is on the ship," even though the injuries were not incurred in the actual performance of the seaman's duties, and that the same rule applies to all seamen on shore leave unless they leave the ship contrary to orders. *Ibid*, pages 731–733.

Provision of medical care by the Public Health Service is not dependent on whether the seaman's injuries or illness was incurred in the service of the ship. (42 CFR, Sec. 32.6 et seq.)

(b) *Wilful fault or misbehavior of the seaman.*

Liability for maintenance and care does not extend to cases of wilful misbehavior or wilful act of indiscretion on the part of seamen. The most common cases in which the shipowner assumes no liability are the cases of venereal diseas[illegible] and drunkenness.[19]

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[16] *Marceau* v. *Great Lakes Transit Corp.*, 146 F. 2d 416; cert. den. 324 U. S. 872.

[17] 1943, 318 U. S. 724, 63 Sup. Ct. 930.

Medical care under Public Health Service auspices is available to seamen injured in street brawls only at hospitals of the Public Health Service or those providing medical care under a contract with the Public Health Service (42 CFR, Sec. 32.21).

(c) *Intentional Concealment.*

The law appears to be that

> * * * the sailor's duty is to disclose whatever he as an ordinarily prudent person should have known was material to the risk, *Lindquist* v. *Dilkes*, 1941, 127 F. 2d 21, 24. See also *Burns* v. *U. S.*, 1945, 62 F. Supp. 603.

Wilful concealment may disqualify a seaman for maintenance and cure.[20] Concealment may be a defense in an action under the Jones Act for compensation for injuries.[21]

Medical care is provided by the Public Health Service without regard to concealment.[22]

ARTICLE 3

1. *Shipowner's liability.*

The shipowner is under duty to provide maintenance and cure.[1] A duty to provide medicines on board ship is imposed by statute (46 U. S. C., Sec. 666).

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[18] *Zambrano* v. *M re-McCormick Lines*, 1942, 137 F. 2d 537.

[19] *Lorie* v. *Am. Hawaiian S. S. Co.*, 1935, 78 F. 2d 819.

[20] *Neilson* v. *The Laura*, 1872, 17 Fed. Cases 1305.

[21] *DeZon* v. *American President Lines, Ltd.*, 1943, 318 U. S. 660, 63 Sup. Ct. 814.

> The maintenance exacted is comparable to that to which a seaman is entitled while at sea. * * * and "cure" is care including nursing and medical attention during such period as the duty continues. *Calmar S. S. Corp.* v. *Taylor,* 1938, 303 U. S. 525, 528, 58 Sup. Ct. 651.

The master has the duty to put into an intermediate port to give the seaman adequate medical care, when a serious accident has occurred and a port is within reasonable distance. *The Iroquois,* 1904, 194 U. S. 240, 24 Sup. Ct. 640.

The duty of the shipowner to furnish maintenance and cure (care) for the injured seaman, both before and after the adoption of this Convention, is the same as the duty provided for in the Convention. In the case of ***Farrell*** v. ***United States,*** 336 U. S. 511, 518, 1949, the Court stated:

> That the duty of the ship to maintain and care for the seaman after the end of the voyage only until he was so far cured as possible, seems to have been the doctrine of the American admiralty courts prior to the adoption of the Convention by Congress,[3] despite occasional ambiguity of language or reservation as to possible situations not before the court. It has been the rule of admiralty courts since the Convention.[4]

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[3] See, for example, *The Wenleydale,* D. C., 41 F. 829; *The Bouker No. 2,* 2 Cir., 241 F. 831; *Skolar* v. *Lehigh Valley R. Co.,* 2 Cir., 60 F. 2d 893; *The Point Fermin,* 5 Cir., 70 F. 2d 602.

[4] See, for example, *Lindgren* v. *Shepherd S. S. Co.,* 2 Cir., 108 F. 2d 806; *The Josephine & Mary,* 1 Cir., 120 F. 2d 459; *Luksich* v. *Misich,* 9 Cir., 140 F. 2d 812.

2. *Public Health Facilities.*

Subject to regulations, seamen employed on vessels registered, enrolled and licensed under the laws of the United States, as well as seamen on certain public vessels, are entitled to medical, surgical and dental treatment and hospitalization without charge at facilities of the Service, and under certain conditions at other public or private facilities at the expense of the Service. Prosthetic and orthopedic devices are authorized to be furnished. In addition, the Public Health Service is authorized to furnish such treatment and hospitalization for seamen of foreign flag vessels at the expense of the owner, master, or agent of the vessel. (42 U. S. C. 249.)

Article 4

The duration of the shipowner's liability for maintenance and cure is not defined by national legislation but is determined by the courts, case by case, in admiralty proceedings. In such proceedings, there is, of course, full opportunity for both parties to adduce expert medical opinion. The national law does not limit the liability of the shipowner to a period of 16 weeks, or to any other fixed period. *Calmar S. S. Corp.* v. *Taylor*, 1938, 303 U. S. 525, 58 Sup. Ct. 651, is the leading Supreme Court case on the subject. That case involved a seaman who stubbed his toe while on the voyage, and was found to have Buerger's disease, an incurable malady of the veins and arteries. The seaman, after receiving hospitalization at various hospitals and being paid small sums at various times for over a year, brought suit to recover for further maintenance and care from the shipowner. The Supreme Court directed the trial court to find what the man needed in the immediate future for maintenance and care, held that it was an error to award a lump-sum payment for maintenance until death, computed by the use of mortality tables, and pointed out that the payment of such a lump sum would not constitute performance of the shipowner's duty to the seaman. With respect to the duration of the shipowner's liability for maintenance and care the Court stated:

> We can find no basis for saying that, if the disease proves to be incurable the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care and medical treatment. (Page 530.)[22]

If a seaman refuses to accept medical care under the auspices of Public Health Service when he is eligible for such care and it is available to him, the shipowner's liability is terminated.[23]

No schemes of compulsory sickness insurance, compulsory accident insurance or workmen's compensation (except as indicated under Article 1) are provided by Federal legislation. However, the Social Security Act amendments of 1946 (60 Stat. 978), which authorize the States to include maritime workers in their unemployment compensation programs, result in bringing seamen within the compulsory sickness insurance schemes of the States of California, New Jersey, and Rhode Island.

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[22] Cf. *The Point Fermin*, 70 F. 2d 602 (CA 5), and *Lukisch v. Misetich*, 140 F. 2d 812 (CA 9), cert. den. 322 U. S. 761; *Farrell v. United States*, 1949, 336 U. S. 511.

[23] *Marshall v. International Marine Co.*, 39 F. 2d 551; *Stewart v. United States*, 26 F. 2d 869.

ARTICLE 5

The duration of the shipowner's liability for wages is not defined by national legislation, but is determined by the courts, case by case, in admiralty proceedings. The national law makes no provision for payment only of a part of the wages of a seaman, and makes no provision for limitation of the wage payments to 16 weeks or any other fixed period. As already indicated under Article 4 above no schemes of compulsory sickness insurance, compulsory accident insurance, or workmen's compensation (except as indicated under Article 1) are provided by Federal legislation.

The shipowner is liable for wages so long as the voyage lasts[24] whether or not the seaman remains on board.[25] The liability extends for the term of the seaman's shipping articles whenever they cover a longer period than the voyage or more than one voyage.[26] The heirs of a deceased seaman in case of his death during the voyage are entitled to wages to which the seaman would have been entitled had he remained on board.[27]

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[24] *The Osceola*, 1903, 189 U. S. 158; 23 Sup. Ct. 483; "* * * the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." *Farrell* v. *United States*, 1949, 336 U. S. 511, 517.

[25] *Halvorsen* v. *United States*, 1922, 234 Fed. 285 (W. D. Wash.); *Enochasson* v. *Freeport Sulphur Co.*, 7 F. 2d 674 (S. D. Texas).

[26] *Great Lakes S. S. Co.* v. *Geiger*, 1919, 261 Fed. 275 (CA 6); *Jones* v. *Waterman S. S. Co.*, 1946, 155 F. 2d 992 (CA 3).

ARTICLE 6

The obligation to return destitute seamen, regardless of fault or cause of destitution, has been assumed by the United States Government. 26 U. S. C. Secs. 678, 679, 683. The law is administered by the State Department. The regulations are published in the Code of Federal Regulations, 22 CFR, Part 118; Foreign Service Regulations, Sec. XVIII–6.

When the destitution is the fault of the shipowner, he becomes liable for the passage.

> An American seaman, disabled in the service of the vessel and who was left in a hospital in a foreign port, is entitled to * * * transportation back to the United States and where these expenses are paid out of funds belonging to the United States, after notice to the owners of the vessel that they were liable for the same and demand made for payment, the owners of the vessel may be liable therefor. 29 Op. Atty. Gen. 54 (Dept. of Justice headnote).

The State Department regulations provide for return to some port in the United States.[28] A sick or injured seaman is entitled to passage to the port of shipment at the expense of the shipowner.[29]

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[27] *Walton* v. *The Neptune*, 29 Fed. Cases 142, No. 17, 135.

[28] 22 CFR, Sec. 118.6.

[29] *The Centennial*, 1881, 10 Fed. 397: *Miller* v. *United States*, 1943, 51 F. Supp. 924.

ARTICLE 7

The employer and the United States Government are charged with the expense of burial of seamen: the employer when he would have been liable for maintenance and cure but for the death of the seaman; the Government if it would have been obligated to expend Government funds for his subsistence and repatriation.[30]

The Public Health Service is authorized to pay the expenses of preparing and transporting the remains, or the reasonable burial expenses, in the case of any patient dying in a hospital or station, to the extent that other public or private funds are not found to be available for such purposes. (42 U. S. C. 248 (e), Sec. 2 (b), Pub. Law No. 781, 80th Cong., 2d Sess.).

ARTICLE 8

The proper disposition of deceased seaman's effects left on board is required of the shipowner by statute. (46 U. S. C., Secs. 621, 625.) In addition, consular officers are responsible for the proper disposition of effects left ashore. (46 U. S. C., Sec. 624.)[31] The Surgeon General is authorized to dispose, pursuant to regulations, of the money and effects of deceased patients of the Service, many if not most, of whom are seamen. (42 U. S. C. 248 (d).)

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[30] Executive Order 6942, Jan. 8, 1935. See also CFR, Sec. 118.7: "Deceased Seaman. The Consular Office shall take all appropriate measures as provided by statute or otherwise for the interment of deceased American seamen and for the proper disposition of their effects."

[31] Ibid.

ARTICLE 9

The shipping Commissioners of the United States Coast Guard are empowered by statute to act as arbiters of any issue submitted to them in writing by both the employer and the worker. (46 U. S. C., Sec. 651.)

There is no similar statutory provision with respect to procedure before a consul overseas. A consul may, however, act as an arbiter. 21 Op. Atty. Gen. 201. The regulations of the consular service provide that:

> It shall be the duty of a consular officer to take appropriate action as provided by statute or otherwise in connection with complaints, disputes and offenses arising aboard American vessels at ports within his jurisdiction,

and

> A consular officer is regarded as the adviser and counsel of the seamen and if an officer has reason to believe that a seaman is in difficulty either aboard ship or ashore, he is enjoined to investigate at once and take appropriate action. 22 CFR, Sec. 119.1, 119.2; Foreign Service Regulations, Sec. XIX-1, XIX-2.

In this connection, it has been held that a consul's decision with respect to rights under the shipping articles, where the dispute has been submitted to him, should not be disturbed in the absence of a showing that it was contrary to law.[32]

At the ports of the territories and possessions of the United States, United States customs officers perform those functions relative to the protection and relief of seamen pursuant to the

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[32] *Uriarte* v. *United States*, 1926, 14 F. 2d 164.

Foreign Service Regulations which the United States Consuls perform in foreign ports.

ARTICLE 10

The question relative to the application of this Article is answered in the discussions of Articles 1, 4, 6, and 7 above.

ARTICLE 11

Equal treatment of all seamen on American ships is assured in the law except that the State Department does not assume any obligations to repatriate destitute foreign seamen who shipped at a foreign port except in cases of shipwreck or bankruptcy on the part of the owner. In case of abandonment by the shipowner such destitute seamen are given relief until they can be aided by the consul of their own country. 22 CFR, Part 118.

ARTICLE 12

There is nothing in United States law or practice which would be inconsistent with the requirements of this Article.

III

The general maritime law is enforceable in the Federal courts. United States Const., Art. III, Sec. 2. The Act of March 24, 1943 (50 U. S. C. App., Secs. 1291–1295), extending certain statutory benefits to seamen on United States or foreign flag vessels operated by the War Shipping Administration, provides that it shall be administered by the War Shipping Administration.

This Agency was abolished and its functions transferred to the United States Maritime Commission on September 1, 1946 (Act of July 8, 1946, Pub. Law No. 472, 79th Congress, 2d Session, Sec. 202).

The statutes providing for workmen's compensation and unemployment compensation are administered under the supervision and direction of the Secretary of Labor (Reorganization Plan No. 19 of 1950, Reorganization Plan No. 2 of 1949 (63 Stat. 1065); the statutes providing for vocational rehabilitation are administered under the supervision and direction of the Federal Security Administrator (29 U. S. C., Sec. 31 et seq.).

The statutes providing for medical care by the Public Health Service are administered by the Surgeon General of the Public Health Service under the supervision and direction of the Federal Security Administrator. (42 U. S. C., Sec. 202.)

The State Department administers the statutes concerned with subsistence and repatriation of seamen overseas, and those concerned with the effects and burial of seamen deceased overseas. (46 U. S. C., Secs. 678, 679, 683, 624.)

IV

The Supreme Court has referred to the Convention in the following cases: *DeZon* v. *American President Lines Ltd.*, 1943, 318 U. S. 660; 63 Sup. Ct. 814; *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 1943, 318 U. S. 36; *Aguilar* v. *Standard Oil Co.*, 1943, 318 U. S. 724; 63 Sup.

Ct. 930; *Farrell* v. *United States*, 1949, 336 U. S. 511.

V

It is estimated that approximately 100,000 seamen served on American flagships subject to the provisions concerning shipowners liability, etc. No estimation is available at this time as to the number of seamen assisted in virtue of these provisions, or the expenditures incurred by shipowners and by the United States in respect of liability under this Convention.

Copies of previous reports on this Convention submitted to the I. L. O. have been sent to the Organizations named below and no observations of any nature have been received from these Organizations relative to these reports.

VI

Copies of this report are being mailed to:

United States Chamber of Commerce.
National Association of Manufacturers.
American Federation of Labor.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 87.

WALTER K. WARREN,

Petitioner,

against

UNITED STATES OF AMERICA.

MOTION BY UNITED STATES LINES COMPANY FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE.*

United States Lines Company respectfully moves this Court pursuant to Rule 27, Paragraph 9 of the Rules of this Court for leave to file a brief in this case *amicus curiae.* Both parties have refused to consent to the filing of such brief. Petitioner, naturally, does not wish additional opposition. It is not the practice of the Department of Justice to so consent.

The petition for certiorari in the case at bar asserts a seaman's right to recover maintenance on account of injuries received ashore. It is based on a misapplication of *Aguilar* against *Standard Oil Company,* 318 U. S. 724 and also on a treaty popularly known as Convention 55 (Shipowners Liability Convention 1936, 54 Stat. 1693). It is asserted by petitioner that by reason of dicta in the *Aguilar* case and the terms of the treaty, seamen are entitled to maintenance while ashore for pleasure irrespective of the circumstances under which the injuries are received. These were the questions presented on the petition for the writ of certiorari.

These contentions, if sustained, would put a heavy burden on the American merchant marine and, naturally, private shipping companies have a substantial interest in their disposition.

The United States Lines Company is a steamship company operating a large fleet of ships and it employs a large number of seamen. At the present time there are pending against United States Lines several cases involving claims by seamen to recover maintenance for injuries allegedly occurring while on shore for pleasure. Two of these cases are *Wilkie* v. *United States Lines Company*, pending in the United States District Court, Southern District of New York, and *Coimbra* v. *United States Lines Company*, pending in the City Court of the City of New York. In addition, a number of other claims have been made against United States Lines Company for maintenance arising out of shore injuries. Similar claims are being pressed against other steamship companies.

The liability of a shipowner for such maintenance is perhaps obscure. In *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, this Court, while allowing maintenance to a seaman who was injured on premises at which his ship had docked, left open the question of whether maintenance might be recoverable by seamen on account of injuries received while they are ashore for pleasure in public places. However, some courts, relying on the dicta in the *Aguilar* case, have permitted awards of maintenance under circumstances which were not considered at the time that the *Aguilar* opinion was handed down.

It so happens that the present counsel for the United States Lines Company were counsel for the Standard Oil Company in the *Aguilar* case. Indeed, the same counsel appeared for the United States in the case at bar in the Court of Appeals for the Second Circuit and in the trial Court.

Because of the aforementioned pending actions and the claims which are made from time to time against the movant, it has a substantial interest in the determination of this question. Its precise interest is that the doubts created by the *Aguilar* dicta may be set at rest and the *Aguilar* case confined strictly to its facts. It is well known in shipping circles that other steamship companies are similarly interested.

Neither party in the case at bar has yet filed a brief on this appeal, so that the arguments to be made by them are not presently known except as they may appear in the petition and brief for certiorari and the Solicitor General's brief in opposition thereto.

The United States, naturally, does not have the interests of a private shipowner. That it is the shipowner is accidental. It became a shipowner only because it could better conduct the war. Since that time it has withdrawn from private shipping. Thus, it is probable that the United States will not fully argue the private shipowner's position.

The indifference of the United States to the questions here involved was made abundantly clear in *Sullivan* v. *United States*, 179 F. 2d 924, affirming 73 F. Supp. 525. That case involved maintenance for shore injuries. It was argued and decided by the same Court at the same time as the case at bar. The facts there were slightly different. Because of this Court's dicta in the *Aguilar* case, the Court of Appeals felt constrained to allow Sullivan maintenance.

However, speaking of the United States (the shipowner) the Court said (p. 925):

> "The appellant also submits cogent arguments for denying recovery under such circumstances as the case at bar presents. But if the principles of the Aguilar case are to be so restricted, a decision to that effect must be obtained from the court of last resort."

Among the circumstances referred to was the fact that Sullivan was not on articles, did not sleep on board the ship and, indeed, received an allowance for board and lodging for sleeping ashore. His injuries occurred while he was approaching the ship, while still on a public street and while he was somewhat under the influence of liquor.

It is plain that the Court of Appeals was desirous of setting these questions to rest and that, if it had relied on its own notion of the law, might well have denied maintenance.

Present counsel who represented the United States on that appeal and in the trial court urgently requested the Attorney General to petition this Court for a writ of certiorari but the request was refused. In the face of the language of the Court of Appeals, a private shipowner would have had no hesitancy whatever in seeking a writ of certiorari. The case had been appealed by the shipowner in the first instance as a test case (the amount involved was but $1,515.50). The United States, not faced with a private shipowner's problems, did not have sufficient concern for a settlement of this very burdensome problem to even make an application for certiorari.

That the dicta in the *Aguilar* case has made the problem of maintenance for shore injuries an unjust burden on shipowners may be readily gleaned from the appendix annexed to this motion (pp. 7-9) which synopsizes the facts in the cases which have been decided to date extending the limits of the *Aguilar* decision. It will be seen that they range from barroom and street brawls to bedroom escapades.

It is noted also that in the case at bar in its brief in opposition to the petition for certiorari the United States said very little about this problem, again evincing lukewarm interest in the subject.

It is not known what position the United States will take on the question of the application of the Shipowner's Liability Convention of 1936, 54 Stat. 1693. While the brief opposing certiorari made a short argument supporting the position of the shipowner with regard to interpretation of the treaty, the argument was not made from the private shipowner's viewpoint. No consideration was given to the effect which an erroneous interpretation of the Convention might have on private shipowners and the excessive financial and other burdens which it would impose.

It is submitted that, in any event, the shipowner's point of view should be before the Court. At the present time, the merchant marine of the United States is in a critical condition. Operating costs are considerably higher than those of competing foreign nations and before additional burdens are placed on the American merchant marine, it should at least have a hearing. Such hearing could be obtained by this court's permission to file a brief *amicus curiae*.

United States Lines Company respectfully prays that it be permitted to file a brief *amicus curiae* to set forth viewpoints and arguments on the questions involved in the case at bar which may otherwise not be presented by the parties.

Dated New York, December 8, 1950.

Respectfully submitted

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APPENDIX.

SYNOPSIS OF CASES ALLOWING MAINTENANCE FOR SHORE INJURIES BECAUSE OF *AGUILAR* DICTA.

Barroom Brawls.

Moss v. *Alaska Packers Association,* 1945 AMC 493, 70 Cal. Ap. 2d 857, 160 P. 2d 224.

In a bar in Tasmania, Moss consumed 5 drinks of straight Scotch whiskey and was later struck over the head by persons unknown. He was allowed maintenance for injuries so sustained.

Nowery v. *Smith, et al.,* 69 F. Supp. 755 Aff'd 161 F. 2d 732.

Nowery and shipmates after consuming liquor in a bar quarreled and brawled. Maintenance was allowed.

Brawls in Public Streets.

Sullivan v. *United States of America,* 73 F. Supp. 525, aff'd 179 F. 2d 924.

Sullivan was injured in a street altercation, according to police records, after having consumed 18 to 20 glasses of beer. Maintenance was allowed because of libelant's story that the altercation was a hold-up, although he was unable to explain how his leg was fractured.

Stanley v. *Weyerhaeuser Steamship Company, et al.* (Superior Court, State of Cal.) 1947 AMC 411. (Not officially reported.)

When 17 miles from his vessel and under the influence of alcohol, Stanley received injuries under circumstances that he professed not to know. The shipowner had to pay maintenance.

Grovell v. *Stockard Steamship Co.,* 78 F. Supp. 931.

While ashore at Catania, Sicily, Grovell got into an argument with a native hack driver who flicked his whip at him causing injuries. Maintenance was allowed.

INJURIES SUFFERED AT PLACES REMOTE FROM VESSEL.

Smith v. *United States of America,* 167 F. 2d 550, reversing 74 F. Supp. 275.

Smith seven miles from his vessel fractured his ankle when leaving a friend's home in fall on defective sidewalk. Maintenance allowed.

Petersen v. *Marine Transport Lines, Inc.,* Superior Court of California, 1948 AMC 544. Petersen's vessel was in the Philippine Islands. While ashore for pleasure he rode to an outlying district in an army truck. He was set upon by assailants and injured. The court stated that there was no evidence of misconduct on Petersen's part but this is not unusual. The seaman denied it and the shipowner could never prove it. Petersen was allowed maintenance.

Taylor v. *United Fruit Company,* New York Supreme Court (Appellate Term) 1947 AMC 1297. (Not officially reported.)

Taylor, although working on a ship, ate and slept at home receiving money allowance therefor. When going from his home to purchase newspaper, he became embroiled in an altercation and received injuries. Judgment allowing maintenance was reversed by the Appellate Court.

Dasher v. *United States of America,* 59 F. Supp. 742. This decision involved only a matter of pleadings. Dasher after consuming liquor journeyed into the hills inland from the port of Oran, Algeria where his ship was moored. While in the hills more drinking followed and he suffered injuries under circumstances which he professed were unknown to him. Exceptions were filed to the libel but they were overruled. Dasher's action was dismissed for failure to prosecute.

Ellis v. *American Hawaiian S. S. Co.,* 165 F. 2d. at 999.

Ellis, after having consumed a quantity of alcohol dove from a spring board into a partly filled pool and received injuries. He was allowed maintenance.

INJURIES AS A SEQUEL TO VICE.

Koistinen v. *American Export Lines, Inc.*, 194 Misc. (N. Y.) 942; 1948 A. M. C. 1464. While his vessel was at a port in Yugoslavia, Koistinen visited a saloon. There he met a woman who lured him to her room as the court puts it "for purposes not particularly platonic;". Koistinen allegedly resisted her charms and then refused to offer her money. She locked the door. Thereafter a man presumably her husband appeared in the doorway causing Koistinen to decide to leave by jumping from the window. In doing so, he sustained injuries. The court allowed him maintenance. In reaching this conclusion the court said that defendant had failed to *prove* that the injuries were sustained through vice, willful misbehavior or deliberate act of indiscretion.

The rule established by this case makes ridiculous the standards of shipowner's liability for maintenance and makes impossible any defense even where the injuries are due to vice.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 87.

WALTER K. WARREN,
Petitioner,
against

UNITED STATES OF AMERICA, as owner of the
Steamship *Anna Howard Shaw, et al.,*
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE UNITED STATES LINES COMPANY, *AMICUS CURIAE.*

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Conclusion—It is respectfully submitted that the shipowner's liability convention is not self-executing. Even if it is the exceptions therein exempt the shipowner from liability for maintenance to a seaman who is injured by reason of his own misconduct. The General Maritime Law of the United States bars recovery in such cases. Moreover, because petitioner's injuries occurred while he was ashore for pleasure, he is under no circumstances entitled to maintenance. The Decree of the Court of Appeals for the Second Circuit Should Be Affirmed 23

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF THE UNITED STATES LINES COMPANY, *AMICUS CURIAE*.

STATEMENT.

United States Lines Company moved on December 8, 1950 for leave to file a brief *amicus curiae*. Permission was granted by this court on January 2, 1951. The order provided that the brief be filed January 5th. It was not possible to have a brief prepared in advance of the permission because briefs of the counsel for the parties were not at hand. Indeed, by courtesy of the clerk of this court, a copy of the brief of the Solicitor General was received as this brief goes to press.

The interest of the United States Lines Company is set forth in its motion for leave to file this brief. For brevity's sake it will not be repeated. It is sufficient to say that as a private shipowner it has substantial interest in the disposition of the issues here involved, in order that it might deal with claims of a similar nature which are presently pending and which will frequently arise in the conduct of its business. The questions involve all private shipowners.

Petitioner complains of the dismissal of his libel for maintenance and wages to the end of the voyage sought because of personal injuries suffered in a shore accident. Petitioner fell from an unprotected ledge which jutted from the outside wall of a "dance hall" located in Bagnoli, Italy. Both the Court of Appeals for the Second Circuit and the district court concluded that petitioner's conduct was reckless. The district court, although implying that petitioner was not fully sober, said that petitioner's conduct was not sufficiently reckless to bar him from recovery. The Court of Appeals said that petitioner failed to exercise even a minimal degree of care for the consequences of his act and denied recovery under the familiar doctrine that seamen who injure themselves by reason of their owns acts of culpable misconduct, indiscretion or gross negligence may not recover maintenance.

THE FACTS.

Scant attention is paid by petitioner in his brief to the facts found by the trial and appellate courts and accordingly it is necessary to state the facts as they appear in the testimony, the courts' opinions and findings.

In the majority of shore injury cases the shipowner has little or no evidence with which to combat the assertions of a seaman who is injured at a great distance from the ship. Thus, in the case at bar, except for hospital records which show that petitioner was intoxicated at the time of his accident, all of the evidence on the vital features of the case are derived directly from petitioner.

Petitioner was a messman employed on the Steamship *Anna H. Shaw* which voyaged to the Bay of Naples. On October 30th, 1944, petitioner in the company of other members of the crew, went ashore in a small boat (R. 33). He and two of his shipmates walked along the shore line (R. 34), and entered the town of Bagnoli (this town was erroneously referred to by petitioner as Magnolia) (R. 101). The buildings of the village showed the effects of bombs and shell fire (R. 102). During their walk, the three men divided a 12 ounce bottle of wine.

Hearing music issuing from one of the buildings petitioner and his companions entered it and found it to be a "dance hall" where wine could be procured (R. 35). There were native women present who by means of smiles and gestures arranged to dance with petitioner and his companions (R. 81). When not dancing the women sat at a table with petitioner and his companions. They did this for about an hour and a half during which period the three men again shared another 12 ounce bottle of wine (R. 81, 82).

Thereupon petitioner decided to look around and entered an adjoining room (R. 83). This room faced on the Bay of Naples. It had a number of large French doors which were open (R. 37, 38). Petitioner ventured out on a narrow ledge which projected beyond the building a distance of about 2½ to 3 feet (R. 66, 67). This ledge was wholly unprotected by any railing whatsoever (R. 38, 67). Nonetheless petitioner proceeded out on it although there was a sheer drop of about 35 feet to rocks which were at the foot of the building (R. 83).

The trial court in its opinion describes the petitioner's reckless action as follows:

> "* * * The french doors of the window extended to the level of the floor and he [petitioner] observed a sort of wholly unprotected ledge or balcony, which extended out from the building some two and a half or three feet. There was no railing of any sort and the slightest misstep or unsteadiness was almost sure to precipitate libellant. In any event, it was a perilous undertaking to go out upon this balcony and one even more perilous to lean over the edge to get a better view of the rocks and waves immediately below. But this is what libellant did. * * *" (R. 102).

During the trial petitioner demonstrated that before he fell he brought his feet to within 6 inches of the edge of the ledge and leaned over so that his head protruded beyond it (R. 85). As he did so, he took hold of a thin rod, only slightly more than ⅛" in diameter (R. 38, 69, 102). He recognized that this was not a hand hold and described it as a "lightning arrester or something like that." (R. 38). He made no effort to try it out to ascertain how secure it was (R. 38). He merely glanced at it casually (R. 67, 70). He attempted to support his overbalanced position by this rod and he fell 35 feet below when the rod failed to support his weight and pulled away from the building (R. 38, 39).

He was taken to the 118th Army hospital by United States military police where a diagnosis of fractured leg and "alcoholism, acute" was made (R. 73)—Respondent's Exhibit A. He received treatment for some time and was then transferred by plane to the United States and ended his hospital treatment in a marine hospital near his home.

As might be expected petitioner denied that he suffered from "acute alcoholism" (R. 73). There is no other hospital evidence on this point. However, the variety of stories given by petitioner as to the manner of his accident leads to the conclusion that alcohol must have confused his mind at the time of his fall. For example, in his claim (R. 93), and libel (R. 5), he says he fell when the railing around a balcony on which he was standing collapsed. Admittedly this did not happen (R. 38). When he entered the Stapleton Marine Hospital petitioner's story was that he fell from a sea wall (Exhibit 3). He gave still another version at the Detroit Marine Hospital (Exhibit B). His shipmates reported to the master that petitioner had fallen off a cliff while ashore. Incidentally, the rest of the log entry is also significant. It reads:

> "On October 30, 1944, at Naples, Italy, Walter K. Warren, messman, on this date injured himself in fall; sent to 118th Station Hospital, Naples, Italy, for treatment. Fell off a cliff while on shore. He stated that he had a drink. Ralph R. Albert, carpenter, and James M. Barr, messman, stated Warren was sober. Injury 'apparently accidental.'" (R. 86).

Petitioner seeks to charge the shipowner with the cost of maintenance and wages for injuries which were suffered while he was not in the service of the ship as those words are used in every day English. He was either so under the influence of alcohol that he failed to appreciate the danger of leaning over the ledge or he was aware of the danger and was reveling in his contempt for it. In either case maintenance was properly denied.

THE QUESTIONS PRESENTED FOR DECISION.

The questions fall into two classes. The first class is the petitioner's right to recover maintenance under the general maritime law of the United States and the second concerns his right to such maintenance under the terms of the Shipowners Liability Convention, 1936, 54 Stat. 1693.

Here petitioner was injured while ashore for pleasure when he became overbalanced while leaning from an unprotected ledge and fell 35 feet. He was not in the service of the ship, was ashore solely for his own pleasure and is consequently not entitled to maintenance. Moreover, his conduct was so reckless as to debar him from recovery.

The Shipowners Liability Convention has no application to this case. It is not self-executing. Even if it were self-executing it did not change the law respecting the shipowner's maintenance obligation. Exceptions in the treaty (Article 2—section 2) exempt the shipowner from liability under the facts in this case.

POINT I.

PETITIONER HAVING BEEN INJURED WHILE ASHORE FOR HIS OWN PLEASURE IS NOT ENTITLED TO MAINTENANCE AND WAGES.

Until the case of *Aguilar* v. *Standard Oil Co. of New Jersey*, 318 U. S. 724 the federal courts held that seamen injured while on shore for personal pleasure were not entitled to be reimbursed for maintenance and cure. *Collins* v. *Dollar S. S. Lines, Inc., Limited,* 23 Fed. Supp. 395; *The President Coolidge*, 23 Fed. Supp. 575; *Smith* v. *American South African Line, Inc.*, 37 Fed. Supp. 262; *Lilly* v. *United States Lines Co.*, 42 Fed. Supp. 214; *Wahlgren* v. *Standard Oil Company of New Jersey* (1941) Amer. Mar. Cas. 1788. These cases followed early American cases which had adopted the ancient maritime codes. However, this Court, in *Aguilar* slightly changed the law and there allowed a seaman who was injured while "returning" to his vessel through a refinery plant, his maintenance and cure. A companion case, *Waterman* v. *Jones*, decided at the same time, similarly allowed recovery but there the seaman was walking on the dock to which the vessel was moored.

In its opinion, this court expressed considerations for seamen which were *dicta*. Actually the court limited its decision to the facts in the cases then before it, viz: seamen injured returning or leaving the vessel while at the place where the vessel was docked. The court said (318 U. S. 724) at page 737:

> "* * * We can see no significant difference, therefore, between imposing the liability for injuries received in boarding or quitting the ship and enforcing it for injuries incurred on the dock or other premises which must be traversed in going from the vessel to the public streets or returning to it from them. That much, at least, is within the liability. How far it extends beyond that point we need not now determine * * *."

Feeling constrained by the *dicta* in the *Aguilar* case, a number of courts have allowed maintenance to seamen for injuries sustained in bar room brawls, on public streets and even for injuries sustained when the seaman jumped from a window to escape an irate husband who had caught the seaman in a bedroom with his wife. *Koistinen* v. *American Export Lines, Inc.*, 194 Misc. (N. Y.) 942.

The trial court in the case at bar similarly felt required to accept the dicta of *Aguilar* (R. 104, 106, 107).

The reluctance of the trial court in reaching its conclusion is illustrated by the following sentences in the opinion:

> "* * * Every drunken brawl in every waterfront dive would put the shipowner to expense as long as the injured seaman maintained he was an innocent bystander and the shipowner could not prove the contrary. The shipowner would in effect become an

> insurer of the safety of his men, on and off the ship, subject to his chance of establishing misconduct" (R. 104).

This court's opinion in the *Aguilar* case does suggest the allowance of maintenance to seamen injured ashore while there for pleasure but its reasoning is based on misconception. The court first says that the ancient maritime codes left the matter in doubt. It next says that seamen as a class are subject to unusual discipline, lack of freedom and opportunity for relaxation. Finally, the court says, that because of the foregoing, the question of seamen's right to maintenance on account of injuries received ashore, being one of first impression, should be decided by liberal considerations for the seamen.

There is no real room for doubt that under the ancient maritime codes a shipowner was not liable for injuries received ashore while the seaman was there for his own pleasure. These codes are found in Volume 30 of Federal Cases beginning with page 1169.

Article VI of the Laws of Oleron, page 1174, is quite specific. It requires the shipowner to provide for cure and maintenance, only if the seaman is wounded or otherwise hurt while acting under "* * * the master's orders and commands. * * *" The laws of Wisbuy, Article XVIII (30 Fed. Cas. 1191) after providing for the liability in the event that a seaman is injured in the ship's service ashore states "* * * but if he goes ashore on his own head to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off; * * *". Similarly the Laws of Hanse Towns, Article XXXIX, (30 Fed. Cas. 1200) provide that seamen wounded in the service of the ship shall be cured at the charge of the ship "* * * but not if he is wounded otherwise. * * *"

The codes specifically provided for maintenance in the case of injuries suffered ashore while in the master's business. No such provision was necessary if it were intended that there should be liability also for injuries suffered otherwise. Indeed, the codes say there was no such liability.

It is clear, therefore, that under the ancient maritime codes seamen injured while ashore for pleasure were not entitled to be maintained and cured at the expense of the ship. No case prior to *Aguilar* allowed maintenance to a seaman injured ashore for pleasure.

Mr. Justice Rutledge in discussing the life of a seaman adverts to the description of it given by Mr. Justice Story in the cases of *Harden* v. *Gordon et al*, 11 Fed. Cas. 6047 and *Reed et al* v. *Canfeld*, 20 Fed. Cas. 11641. These opinions are over 100 years old.

It is anachronistic to describe present day seamen in the same terms. Their working conditions are as good if not better than the average shore worker. The greater part of American seamen have passable education. They are organized in several unions which seamen themselves direct with considerable success. On their special behalf, the unions publish newspapers which instruct and inform them with regard to their legal rights on ships, as to shipping generally and even enter vigorously into the field of national and international politics and economics.

Moreover the conditions on shipboard have vastly improved. Ships are rarely out to sea on the extended voyages which marked Justice Story's time.

It should be realized that the men who follow the sea do so solely from choice. (In Justice Story's time, they were often shanghaied.) They receive high pay for unskilled work and excellent board and lodging. It is doubtful that the middle class people of this country eat as well as seamen do. Their food and living quarters are healthful.

They receive about $75 per week for straight time. They are well paid for overtime and receive bonuses for extra risks. The United States Coast Guard maintains a watchful eye on the conduct of shipowners and ship's officers so that no improper conditions or discipline exist on shipboard. Moreover, the seamen's unions make the shipowners and officers "toe the mark" with great exactness under the constant threat of strike.

Thus the conditions which prompted Mr. Justice Story to make his remarks with regard to the seamen of his day have long since disappeared. The court which applies them to a seaman of today may feel the emotional satisfaction which anyone feels who believes he is protecting the weak and friendless. However, in so doing he confuses words with reality. More and more the courts are discarding irrelevant even though fondly remembered tradition in an effort to base decisions on reality.

Another argument advanced in the *Aguilar* opinion is that by virtue of their calling, they are confined to the ship while it is at sea, and thus deprived of opportunities for relaxation and amusement. So deprived, the argument continues, they are unable to work well, unless opportunity for relaxation is provided ashore. Such relaxation is supposed to make them more efficient and thus serve the ship better. Anything the seamen do therefore, according to the *Aguilar dicta*, which makes them more efficient is done for the benefit of the ship. Not only is the premise false but so also is the conclusion.

Seamen usually work no more than $7\frac{1}{2}$ hours a day. During the middle of their four hour periods of work, they have "coffee time" which lasts for 15 minutes or more. There are radios for their diversion, many seamen carrying their own. Thus, they are provided with the same type of entertainment which shore workers enjoy. They have also the companionship of other seamen not on duty. During their non-working hours, they relax and enjoy themselves with men of their own social level. Their free time also permits them to educate themselves for better jobs. They have no "rush hour" to endure as is the sad case of most shore workers when they ride to and from their place of work in busses or subways. Actually seamen have more free time than shore workers because they do not have to travel to their place of work.

It is common for seamen to remain away from their ship while it is in port and they frequently return to it totally unfit to perform any service for the ship. In truth therefore, it cannot be justifiably said that the shore leave benefits the ship. It is more often a detriment.

No other industry is charged with the obligation to pay wages and provide medical treatment to their employees injured away from their places of work and while enjoying the pleasures of life. None of the compensation laws which have been enacted for the benefit of shore workmen provide for such benefits. Nor is there any compelling reason why seamen should be so protected.

The cases which have followed the *Aguilar* decision are a fair cross section of the litigation which the *Aguilar* decision has apparently spawned. Attached to this brief is a short appendix (pp. 24-26) which synopsizes the facts of the cases decided to date which extend the limits of the *Aguilar* decision. They range from barroom and street brawls to bedroom escapades.

The evils which follow from this line of decisions are numerous. Foremost they encourage fraud. The injuries are suffered in places far beyond the cognizance of the ship's officer personnel and are usually impossible to investigate. For example, in the case at bar petitioner told a variety of stories as to how his injuries came about. He did not even remember the name of the town in which they occurred. It was not until the time of the trial that it was discovered to be Bagnoli, not Magnolia as alleged by petitioner (R. 23). Under oath, petitioner denied in answers to interrogatories that he had used intoxicants (R. 22) but at the trial, admitted having done so (R. 36, 71).

The hopelessness of the situation from the shipowner's viewpoint is apparent from the action which the trial court took in the case at bar, as to petitioner's alcoholism. The court accepted the testimony of petitioner that he was not acutely alcoholic at the time of his accident and rejected the disinterested and objective evidence of the United States hospital records. These hospital records showed unqualifiedly that petitioner was suffering from "acute alcoholism". Thus the court vindicated the unreliable petitioner by compromising his protestations of sobriety and the hospital record of acute alcoholism into a finding that petitioner "was not so under the influence of liquor as to be barred from recovery" (R. 108).

A similar situation arose in *Sullivan* v. *United States*, 73 F. Supp. 525 aff. 179 F. 2d 924. There a seaman who had consumed about twenty glasses of beer which admittedly made him "feel good" and "happy" but "not stupidly drunk", was found to be in the service of a ship as he walked along a street in Brooklyn, N. Y., two hours before he was to report for work. The vital features of Sullivan's testimony were at variance with the stories he had given police officers and United States Marine Hospital but this impartial evidence was rejected and the testimony of the interested money seeking seaman accepted. And so it goes. Defense of claims by seamen to maintenance based upon alleged misconduct thus becomes a mirage. Even though the shipowner by such diligence as it has at its command, produces impartial testimony, it is disregarded in favor of the seaman.

In the *Sullivan* case (179 F. 2d 924), speaking of the shipowner the Court of Appeals said (p. 925):

> "The appellant also submits cogent arguments for denying recovery under such circumstances as the case at bar presents. But if the principles of the Aguilar case are to be so restricted, a decision to that effect must be obtained from the court of last resort."

Among the circumstances referred to was the fact that Sullivan was not on articles, did not sleep on board the ship and, indeed, received an allowance for board and lodging for sleeping ashore. His injuries occurred while he was approaching the ship, while still on a public street and while he was somewhat under the influence of liquor.

The rejection by the trial court of the Army records in the case at bar is not decried because the court accepted petitioner's rather than the shipowner's evidence, but merely to point out the impossibility of successfully defending a case of this kind and the magnificent opportunity thus presented to seamen to mulct steamship companies.

Another shocking example of an award of maintenance to a seaman for injuries received ashore is *Koistinen* v. *American Export Lines*, 194 Misc. (N. Y.) 942. There the seaman having visited various barrooms met a prostitute in one and went with her to her room. According to Koistinen's testimony he had a change of heart but the prostitute insisted on pay. When Koistinen refused to pay her the woman locked the door leaving Koistinen a window as the only way out. At that moment a man appeared in the doorway. (The impossibility of a human being appearing in a locked doorway never occurred to the trial judge.) Koistinen fearing bodily injury from the man who passed through the locked door jumped from the window and broke his leg. The court said that because Koistinen had changed his mind, his actions ceased to be vicious and his injuries received escaping from his prior immoral conduct were chargeable to the shipowner.

It would be impossible for the shipowner to find out whether Koistinen's story was true. It might very well have been that having satisfied himself, he refused to pay and attempted to avoid doing so by leaping from the window.

The *Koistinen* case seems to establish the rule that if at the moment of injury a seaman has withdrawn from his vicious conduct, the shipowner is liable for maintenance. By the same reasoning if the injury took place after completion of the vicious act, the shipowner would still be liable for maintenance. Apparently a seaman needs only wit enough to testify that at the moment of his accident he had ceased pursuing immoral conduct. He could charge the shipowner with the costs of his maintenance even though his injuries were directly connected with and resulted from his immoral or vicious conduct.

To sum up therefore, the *dicta* of the *Aguilar* is not sound. There is no historical basis for allowing seamen maintenance for injuries sustained ashore while there for pleasure nor is there today any acute need by the seamen for such unusual protection. A rule of law allowing maintenance and wages in such circumstances is unjust to the shipowner for it leaves him defenseless in claims of this kind and opens the door to fraud by the seaman. A reappraisal of the attendant circumstances should lead this court, in justice, to confine the *Aguilar* decision to its strict facts and in the case at bar to affirm the decision of the Court of Appeals for the Second Circuit.

If the seamen's needs require allowance of maintenance for injuries received while ashore for pleasure legislation to that effect would undoubtedly have been urged by seamen's unions. They have never done so. Indeed, they have never even urged, except in the case at bar, that the Shipowner's Liability Convention, 1936, 54 Stat. 1693 should be enforced for that purpose. If the need were present seamen through their lawyers and unions would have urged an early construction of the convention.

It follows that seamen, their counsel and unions have never thought that they were entitled to maintenance for injuries received ashore while there for pleasure. Thus there is no need for this court to extend the doctrine announced in the Aguilar decision to include injuries occurring in public places while the seaman is ashore for pleasure.

POINT II.

PETITIONER'S INJURIES WERE DUE TO HIS DELIBERATE ACTS OF INDISCRETION AND HIS OWN MISCONDUCT. RECOVERY FOR MAINTENANCE AND WAGES WAS PROPERLY DENIED.

The *Aguilar* case (318 U. S. 724) recognizes that in the case of injuries due to the seaman's indiscretion or misconduct there is no liability on the part of the shipowner for maintenance. Thus the court said at page 730:

> "* * * So broad is the shipowner's obligation, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility. * * *"

On page 734:

> "* * * the seaman's fault, unless gross, cannot defeat it; * * *"

Again on page 731:

> "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. * * *"

That petitioner was negligent is conceded by everyone in the case. The trial court found that he was negligent (R. 109) as did the Court of Appeals. The trial court describes petitioner's entry upon the unprotected ledge as a perilous undertaking where the slightest misstep or unsteadiness was almost sure to precipate him to serious injury. "It was a perilous undertaking for him to go out on the ledge and even more perilous to lean over the ledge to get a better view." The court held that petitioner's conduct did not amount to recklessness or gross negligence because petitioner says he took hold of a thin rod about 1/8 of an inch in diameter. However, petitioner did not even know the purpose of the rod, nor the method of its fastening. He had not examined it but had given it only a casual glance. In effect the trial court held that because petitioner while deliberately unbalancing himself took hold of a "straw" he was not reckless. What act more reckless short of jumping from the ledge is hard to imagine.

It was held in *Jackson* v. *Pittsburgh S. S. Co.* (CCA 6th) 131 F. 2d 668 that jumping from the side of the ship to the dock, a distance of 6 feet amounted to such recklessness as to destroy Jackson's claim to maintenance.

Petitioner's dangerous act was far worse than what Jackson did. When there is added the fact that petitioner was also at least somewhat under the influence of alcohol, the conclusion that he was "indiscreet" not to say grossly negligent is an inescapable conclusion and so found by the Court of Appeals.

Recovery was properly denied because of petitioner's misconduct.

POINT III.

The Shipowner's Liability Convention has no application to this case. It is not self-executing and its provisions are impossible of enforcement. Even if it were self-executing it did not change the law respecting the shipowner's maintenance obligation and under it petitioner may not recover maintenance.

Despite the general, confusing and indefinite language of the Convention, petitioner in Point I of his brief (page 10) asserts that the provisions are positive, self-implementing, creating enforceable liabilities. He refers at great length to the reports of the International Labour Conferences and connected matters but he never comes to grips with the precise terms of the Convention.

For example, Article 2 provides as follows:

> 1. The shipowner shall be liable in respect of—
>
> (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;
>
> (b) death resulting from such sickness or injury.

While the article, in terms, provides for a liability for sickness and injury, the extent of the liability is not defined therein nor any other place, unless it be considered that Articles 3, 4, 5, 6 and 7 fix the limits of the shipowner's liability. Articles 3 and 4 describe maintenance and cure in its well understood terms. Article 5 provides for the payment of wages during the time the sick or injured seaman remains on board the vessel. Article 6 requires the shipowner to defray the expenses of repatriation of a sick or injured seaman. Article 7 requires the shipowner to defray burial expenses.

Nothing is said in the Convention with regard to other damage elements which are awarded under the Jones Act (Title 46 U. S. C. A. Section 688). Under this statute, on proof of negligence, the seaman may recover damages for pain and suffering, permanent injury and loss of wages.

In the case of death, the Convention fails in any respect to define the extent of the liability imposed on a shipowner except insofar as it is required to pay funeral expenses (Article 7). The Convention creates a liability against a shipowner but not in favor of anyone. No beneficiaries are designated.

If, as petitioner contends, the Convention is the supreme law of the land, by implication, it overrules the Jones Act (46 USCA 688) and Death on the High Seas Act (46 USCA 761). The terms of the Convention, as now interpreted by petitioner, would not permit the enforcement of these statutes. His argument is that the expression in the Convention "national laws may provide" refers to some future act, and not to law, whether decisional or legislative, existing when the Convention was ratified.

No doubt petitioner would refuse to go to the point where his logic carries him but he cannot have it both ways. If the Convention is the last word in the regulation of the duties of shipowners to sick and injured seamen, these statutes no longer have any force and effect and seamen are relegated to maintenance, some wages and free burial.

Petitioner's position in this regard is not in any wise aided by Article 12 of the Convention. That article provides as follows:

> "Nothing in this Convention shall affect any law, award, custom, or agreement between shipowners and seamen which ensures more favorable conditions than those provided by this Convention."

Nothing is said as to who should be favored, shipowner or seaman. This is another confusing article. It cannot be construed to be "favorable to the seaman" because one of the alleged purposes of the Convention was to level off competition among shipowners by providing equal benefits to seamen. (H. R. Report No. 1328, 76th Congress 1st Sess.)

The United States Lines does not here urge that the court agree with petitioner's logic, but maintains that the Convention is not self-executing and that the statutes and decisional law in force at the time of the ratification of the Convention still remain in full force and effect.

Another illustration of the non self-executing character of the Convention is Article 1, Section 1, which states:

> "This convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation."

Again an exception is permitted with regard to this, but, according to petitioner, to be enforceable, national laws must be enacted subsequent to the date of ratification of the Convention. Thus, by petitioner's logic, the Convention overrules the Longshoremen and Harbor Workers' Compensation Act (33 USCA 901 *et seq.*). It hardly needs argument that the United States Senate did not intend by ratification of the Convention, to overrule the Compensation Act, Jones Act or Death on the High Seas Act.

That the interested parties did not concede that the Convention was fully self-executing is plainly stated in the report referred to by Mr. Chief Justice Stone in the *Aguilar* case, 318 U. S. 724 at 734. That report is No. 1328, 76th Congress, First Session, H. R. 6881. The Congressional Committee which prepared a bill to implement the Convention refused to take a position as to whether the Convention was or was not self-executing. Moreover, the President requested implementing legislation. The bill prepared to implement the Convention was never enacted. So far as counsel can discover, failure of enactment was due to opposition of both labor and industry.

The terms of the Convention and their impact on the existing laws of the United States make it inconceivable that the Convention be regarded as self-executing. Its terms are so general, so confusing and so indefinite that if self-executing the convention could not be administered. It is submitted that it is not self-executing.

Even if the Convention be regarded as self-executing the facts in this case come squarely within the exception provided in Article 2, Section 2, Subdivisions (a) and (b) which provides as follows:

> "2. Provided that national laws or regulations may make exceptions in respect of:
>
> (a) injury incurred otherwise than in the service of the ship;
>
> (b) injury or sickness due to the wilful act, default, or misbehaviour of the sick, injured, or deceased person;"

The "national laws and regulations" referred to are not only the statutory law but also the decisional law. This was the view of all the executive departments; the State Department and also the acting solicitor. The views of the various departments in this regard are found in the report above mentioned.

Mr. Hull considered the "national laws" of the United States to consist of both statutory and common law. He said, page 7 (Report No. 1328, 76th Congress, First Session, H. R. 6881):

> "* * * The present law of this country, as exemplified by statutes, court decisions, and admiralty or common law, * * *."

Mr. Hull, on page 11, refers to the opinion of Chairman of the Maritime Commission that the Convention did not change the existing rights of seamen. He refers to that opinion in the following language:

> "* * The Chairman of the Maritime Commission sees no advantage in ratification, as American law at present provides substantially equal or greater rights than those provided in the draft convention."

This also means that subdivision 2 of Article 2 refers to existing case law and not to new legislation to be enacted and that the case law saves a shipowner from a maintenance liability when the seaman is injured by his own misconduct.

On the effective date of the Convention the "national laws" of the United States provided that seamen injured while ashore for pleasure had to bear the cost of their own maintenance if the injury was due to misconduct or gross negligence.

Intoxication:

> *The Berwindglen* (C. C. A. 1), 88 F. 2d 125;
> *Barlow* v. *Pan Atlantic S. S. Corporation, et al.* (C. C. A. 2), 101 F. 2d 697;

Lortie v. *American-Hawaiian Steamship Company* (C. C. A. 9), 78 F. 2d 819.

Venereal Diseases or Gross Acts of Indiscretion:

The Alector, 263 Fed. 1007;

Chandler v. *The Annie Buckman*, 5 Fed. Cas. 449 (Case No. 2,591a);

Zambrano v. *Moore-McCormack Lines, Inc.*, 131 F. 2d 537.

Personal Fight:

Lortie v. *American-Hawaiian Steamship Company, supra;*

Brock v. *Standard Oil Company of New Jersey*, 33 F. Supp. 353.

Willful Misconduct:

Oliver v. *Calmar S. S. Co.*, 33 F. Supp. 356;

Jackson v. *Pittsburgh S. S. Co.* (CCA 6th), 131 F. 2d 668.

Thus the injury sustained by petitioner in this case was not one for which, under our "national laws", the shipowner was required to pay maintenance, on the effective date of the Convention.

The argument of petitioner that the exceptions in Article 2 Section 2 are inapplicable because they are not self-executing is based on a misunderstanding of the provisions. Throughout petitioner's brief, he erroneously implies that only laws enacted subsequent to the ratification of the Convention may be considered. The falsity of this argument has heretofore been amply demonstrated, in connection with the effect of the Convention on the Jones Act and the Death on the High Seas Act and the Longshoremen's Act.

Under the terms of the Convention the national laws of a country could limit the full operation of portions of the Convention as in the case of subdivision 2 of Article 2. Our national laws did limit the seamen's right to maintenance. It absolved a shipowner from a maintenance obligation where the injuries were incurred outside the service of the ship or due to willful act, default or misbehavior. The petitioner's act was certainly a willful one or misbehavior. His injuries so sustained come within the exception provided in the Treaty. He was properly denied maintenance.

CONCLUSION.

It is respectfully submitted that the shipowner's liability convention is not self-executing. Even if it is the exceptions therein exempt the shipowner from liability for maintenance to a seaman who is injured by reason of his own misconduct. The General Maritime Law of the United States bars recovery in such cases. Moreover, because petitioner's injuries occurred while he was ashore for pleasure, he is under no circumstances entitled to maintenance. The Decree of the Court of Appeals for the Second Circuit Should Be Affirmed.

Respectfully submitted,

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APPENDIX.

SYNOPSIS OF CASES ALLOWING MAINTENANCE FOR SHORE INJURIES BECAUSE OF *AGUILAR* DICTA.

Barroom Brawls.

Moss v. *Alaska Packers Association*, 1945 AMC 493, 70 Cal. Ap. 2d 857, 160 P. 2d 224.

In a bar in Tasmania, Moss consumed 5 drinks of straight Scotch whiskey and was later struck over the head by persons unknown. He was allowed maintenance for injuries so sustained.

Nowery v. *Smith, et al.*, 69 F. Supp. 755 Aff'd 161 F. 2d 732.

Nowery and shipmates after consuming liquor in a bar quarreled and brawled. Maintenance was allowed.

Brawls in Public Streets.

Sullivan v. *United States of America*, 73 F. Supp. 525, aff'd 179 F. 2d 924.

Sullivan was injured in a street altercation, according to police records, after having consumed 18 to 20 glasses of beer. Maintenance was allowed because of libelant's story that the altercation was a hold-up, although he was unable to explain how his leg was fractured.

Stanley v. *Weyerhaeuser Steamship Company, et al.* (Superior Court, State of Cal.) 1947 AMC 411. (Not officially reported.)

When 17 miles from his vessel and under the influence of alcohol, Stanley received injuries under circumstances that he professed not to know. The shipowner had to pay maintenance.

Grovell v. *Stockard Steamship Co.*, 78 F. Supp. 931.

While ashore at Catania, Sicily, Grovell got into an argument with a native hack driver who flicked his whip at him causing injuries. Maintenance was allowed.

INJURIES SUFFERED AT PLACES REMOTE FROM VESSEL.

Smith v. *United States of America,* 167 F. 2d 550, reversing 74 F. Supp. 275.

Smith seven miles from his vessel fractured his ankle when leaving a friend's home in fall on defective sidewalk. Maintenance allowed.

Petersen v. *Marine Transport Lines, Inc.,* Superior Court of California, 1948 AMC 544. Petersen's vessel was in the Philippine Islands. While ashore for pleasure he rode to an outlying district in an army truck. He was set upon by assailants and injured. The court stated that there was no evidence of misconduct on Petersen's part but this is not unusual. The seaman denied it and the shipowner could never prove it. Petersen was allowed maintenance.

Taylor v. *United Fruit Company,* New York Supreme Court (Appellate Term), 1947 AMC 1297. (Not officially reported.)

Taylor, although working on a ship, ate and slept at home receiving money allowance therefor. When going from his home to purchase newspaper, he became embroiled in an altercation and received injuries. Judgment allowing maintenance was reversed by the Appellate Court.

Dasher v. *United States of America,* 59 F. Supp. 742. This decision involved only a matter of pleadings. Dasher after consuming liquor journeyed into the hills inland from the port of Oran, Algeria, where his ship was moored. While in the hills more drinking followed and he suffered injuries under circumstances which he professed were unknown to him. Exceptions were filed to the libel but they were overruled. Dasher's action was dismissed for failure to prosecute.

Ellis v. *American Hawaiian S. S. Co.,* 165 F. 2d. at 999. Ellis, after having consumed a quantity of alcohol dove from a spring board into a partly filled pool and received injuries. He was allowed maintenance.

Injuries As A Sequel To Vice.

Koistinen v. American Export Lines, Inc., 194 Misc. (N. Y.) 942; 1948 A. M. C. 1464. While his vessel was at a port in Yugoslavia, Koistinen visited a saloon. There he met a woman who lured him to her room as the court puts it "for purposes not particularly platonic;". Koistinen allegedly resisted her charms and then refused to offer her money. She locked the door. Thereafter a man presumably her husband appeared in the doorway causing Koistinen to decide to leave by jumping from the window. In doing so, he sustained injuries. The court allowed him maintenance. In reaching this conclusion the court said that defendant had failed to *prove* that the injuries were sustained through vice, willful misbehavior or deliberate act of indiscretion.

The rule established by this case makes ridiculous the standards of shipowner's liability for maintenance and makes impossible any defense even where the injuries are due to vice.